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No. 143

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE BOARD OF TRADE OF KANSAS CITY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

NOVEMBER 1941.

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OPINIONS

The opinion of the specially constituted District Court (R. 737), *Board of Trade of Kansas City* v. *United States*, is reported in 36 F. Supp. 865.

The reports of the Interstate Commerce Commission entitled "*Rate Structure Investigation, Part VII, Grain and Grain Products* within the Western District and for Export" appear in 164 I. C. C. 619; 173 I. C. C. 511; 205 I. C. C. 301; 215 I. C. C. 83; 223 I. C. C. 235; 229 I. C. C. 9; 231 I. C. C. 793 (R. 27, 233, 268, 526, 612, 635, 647).

QUESTIONS PRESENTED

In the above-entitled proceeding, after comprehensive investigation, the Commission determined that the method of making rates for the great volume of grain traffic to and from the important primary grain markets such as Minneapolis, Omaha and Kansas City should be a system of rates breaking on the markets ("rate-break combinations") consisting of local rates to the markets and proportional rates from the markets. It then proceeded to work out and prescribe graded in-bound local rates from all the western grain-producing states to the primary markets and sensitively related out-bound proportional rates from the several markets to important destinations, gateways, and secondary markets. One important purpose of this method of rate-making was to correct objectionable and discriminatory conditions previously existing under a dual system of rates, under which the traffic moved from the markets on both proportional rates and a multitude of lower, varying transit balances. (See *infra*, p. 15.) To this end, the Commission required that the prescribed rate-break combinations should be the exclusive basis of charge on traffic moving through the primary markets; that all traffic transited at the markets, that is, shipped to the markets for merchandising, milling, mixing or other treatment and later reshipped, should move on the prescribed local rates into the market and the prescribed open proportional rates from the market, and that all one-factor through rates carrying the transit privilege at the markets, which made possible the varying transit balances from the markets, should be canceled.

Under the prescribed system of rates the primary markets are accorded liberal transit privileges. Grain dealers and millers located there can draw in grain over any railroad in any direction, and, after transit, ship the grain or the products thereof to any destination over any route at the proportional rates prescribed as the reasonable out-bound component of the rate-break combinations. This system of rates, as applied to the

entire traffic, the Commission found, gives the rate-break markets a decided advantage over the so-called interior points, which do not have the rate-break system, and can transit only under a restricted form of transit under overhead through rates.

To permit carrier competition, the orders make one exception to the rule for the exclusive application of the rate-break combinations on traffic moving through the primary markets. In some instances a particular market is served not only by several direct-route carriers but also by other carriers forming indirect routes which pass through a second market, as in the case of the numerous routes from Omaha to Chicago, most of which are direct, while some, termed indirect, run through Kansas City. The orders authorize the indirect-route carriers to apply the prescribed proportional rates from one market to another as overhead through rates over the indirect route passing through an intermediate third market, but, in order to preserve the rate-break system, prohibit transit under such overhead through rates at the intervening market, because to permit the privilege under such circumstances would result in transportation from the intermediate market at a transit balance substantially lower than the prescribed reasonable proportional rate from that market, and thus restore the dual system. Under all other circumstances the primary markets are granted the transit privilege under liberal rules and regulations.

At the so-called interior points—mill and elevator points other than the primary markets—a restricted form of transit is generally granted. The carriers voluntarily extended this restricted form of transit to interior points on the direct routes under the rates prescribed by the Commission. In a supplementary report, the Commission permitted the indirect-route carriers to grant the same restricted form of transit to interior points on the indirect routes, upon a finding that the denial of similar transit to the competitive interior points on indirect routes would result in undue prejudice against them and undue preference of the interior points on direct routes. The validity of the grant of transit to interior points on direct routes is not

here involved. The prescribed proportional rates from the primary markets (which were reductions), are not attacked, nor are the prescribed in-bound local rates to the primary markets. The bill alleges that the orders are invalid insofar as they prohibit transit at the rate-break markets and permit transit at the interior points under the above-stated circumstances, and seeks to set aside the orders to this extent only.

The question presented, therefore, is whether the Commission's orders are invalid insofar as they prohibit the grant of transit at the primary markets under proportional rates from other primary markets as applied over indirect routes in order to meet carrier competition, while permitting the restricted form of transit at intermediate interior points on the indirect routes. Subordinate questions presented by appellants in that connection are:

1. Whether the denial of transit at the primary markets under the circumstances and conditions found results in rates that are unreasonable, unjustly discriminatory, or unduly preferential, in violation of sections 1, 2 and 3 of the Interstate Commerce Act.

2. Whether the grounds upon which the Commisison based its finding that the denial of the privilege at the primary markets does not result in unjust discrimination or undue prejudice or preference are insufficient in law.

3. Whether in reaching this conclusion the Commission improperly considered other than transportation conditions.

4. Whether the orders are invalid on the ground that they deprive the primary markets of natural advantages.

STATUTES

The provisions of sections 1 (5), 2, 3 (1). 15 (1), and 15a of the Interstate Commerce Act (49 U. S. C.) are as follows:

> SEC. 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just

and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, draw-back, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation

and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15a. When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due considera-

tion, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

STATEMENT

Appellants' bill (R. 1) seeks to enjoin, to the extent indicated above,[1] the orders issued with four of the reports in *Rate Structure Investigation, Part VII*, as follows: October 22, 1934, 205 I. C. C. 301; report, R. 268–525; order, R. 525–526. March 4, 1936, 215 I. C. C. 83; report, R. 527–584; order, R. 585–586. July 12, 1938, 229 I. C. C. 9; report, R. 635–646; order, R. 646–647. March 13, 1939, 231 I. C. C. 793; report, R. 648–654; order, R. 654–655.[2]

The United States and the Commission, named as defendants, filed answers (R. 655, 658). Various parties intervened as defendants and filed answers opposing the relief sought by the bill, including the regulatory commissions of Montana, Idaho, Oklahoma, and North Dakota, and shipping interests in the west and southwest (R. 684–706, 707).

Final hearing before the court below, specially constituted of three judges, was held at Kansas City, Mo., November 11, 1940 (R. 706–721).

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[1] In the argument, *infra*, section VIII, pp. 86–89, we urge that appellants' bill was properly dismissed because it asks that the rate orders be enjoined only in part; that is, that the court enjoin an integral part of the rate structure administratively designed, and that, therefore, the bill in effect asks the court to *revise* the prescribed rate structure and thus to perform an administrative or legislative rather than a judicial function.

[2] The last two reports cited, also the report of July 27, 1937, 223 I. C. C. 235 (report, R. 613–633, order, R. 634), embrace also the Commission's decisions in certain formal complaints, filed after the close of the main proceeding, referred to *infra*, pp. 11, 32.

January 21, 1941, the court rendered its opinion (R. 737), finding the alleged grounds of invalidity to be without merit and dismissing the bill. Findings of fact and conclusions of law were adopted (R. 750, 754). From the final decree (R. 756) filed February 24, 1941, a direct appeal to this Court was taken.

Original proceedings before the Commission

The Commission's investigation was initiated December 30, 1926, in response to the Hoch-Smith Resolution (43 Stat. 801; 49 U. S. C. 55), to determine whether the rates, rules, regulations, and practices maintained by the rail carriers for the transportation of grain and grain products in the Western District, embracing the territory of the United States west of the Mississippi River, were unjust or unreasonable, unjustly discriminatory, unduly prejudicial or preferential, or otherwise in violation of the provisions of the Interstate Commerce Act. There were then pending before the Commission 58 separate proceedings in which shippers had filed complaint against the rates or relations of rates, or practices of the carriers affecting rates, on grain and grain products in the Western District. These were consolidated with the general investigation.

After extensive hearings the Commission on July 1, 1930, issued a report and order and, on April 13, 1931, a supplemental report, 164 I. C. C. 619 (R. 27–232); 173 I. C. C. 511 (R. 233–267). In a suit instituted by the carriers, this Court, in *Atchison, etc., Ry. Co.* v. *United States*, 284 U. S. 248, held that the Commission's denial of a petition for rehearing filed by the carriers, which alleged changed conditions since the close of the hearings, amounted to a denial of a full hearing, and set the order aside.

Rehearings

Thereafter the proceeding was reopened for rehearing upon all issues involved. Extensive further hearings were held, a

mass of additional evidence was submitted, briefs were filed, and the questions involved were reargued orally before the Commission.

October 22, 1934, the Commission issued its report on further hearing, 205 I. C. C. 301 (R. 268–524), in which, in the light of the enlarged record fully reflecting the conditions then existing, it prescribed a revised rate structure on grain and grain products in the Western District, found by it to be reasonable and free from undue preference and prejudice. Many of the findings of the earlier reports were affirmed, many were modified.[3]

With the report an order was issued (R. 525–526) which required the respondent carriers to establish, maintain, and apply to the interstate transportation of grain and grain products, rates not exceeding those prescribed in the report, and practices in harmony with the findings therein. The prescribed rates are set forth in an Appendix to the report (R. 490–524).

March 4, 1936, a supplemental report, 215 I. C. C. 83 (R. 527–584), and an order (R. 585–586) were issued, clarifying and modify in certain respects the findings in the previous report.

These orders were issued under section 15 (1) of the Interstate Commerce Act, upon findings of unreasonableness and undue preference and prejudice, in violation of sections 1 (5) and 3 (1). In addition to numerous specific findings, the following general findings were made in the report of October 22, 1934, 205 I. C. C. 472 (R. 473):

> We find that the present rates for the interstate transportation of wheat and coarse grains and their products are unreasonable and unduly preferential and prejudicial to the extent they exceed the rates pre-

[3] The original findings as to the rate-break structure were affirmed. There were modifications of the original findings as to the rate levels in the Southwest and the far West. The new report prescribed higher rate levels in those territories.

scribed in the appendix hereto, to be applied in accordance with the discussion and findings as to rate break, relation of commodities, transit, etc., herein previously set forth.

* * * * *

We further find that the present rules, regulations, and practices affecting the interstate transportation of grain and grain products throughout the affected territory are unreasonable and unduly preferential and prejudicial to the extent they fail to conform to the findings herein.

The general findings in the supplemental report of March 4, 1936 (215 I. C. C. 83, 128, R. 526, 581–582), are as follows:

We find that the present rates and practices of respondent carriers are unreasonable and unduly prejudicial to the extent they do not conform to the rates and practices required in the report on further hearing, as corrected, modified, and supplemented herein. The report on further hearing and the order entered in connection therewith are corrected, modified, and supplemented accordingly.

The findings in the report on further hearing, to the extent not modified herein, are affirmed.

July 1, 1935, the rates, regulations, and practices prescribed in the report and order of October 22, 1934, were made effective by the respondent carriers, without contest, and they are still in effect, except as modified in certain particulars in the supplemental report of March 4, 1936, which became effective August 1, 1936, and as subjected to later general increases.[4]

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[4] The rates on grain prescribed in this proceeding, along with practically all other rates in the United States, were subjected to the increases authorized in March 1938 in *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41 and 746, viz, increases of ¼ cent in rates of 5 cents and less; ½ cent in rates of more than 5 cents but not more than 10 cents; and 5% of other rates, fractions to be resolved in the customary manner. To avoid uncertainty, this brief refers to the prescribed rates, not the subsequently increased rates, unless indicated to the contrary.

Thereafter, formal complaints were filed with the Commission which alleged that certain of the rates and practices prescribed in the above-mentioned reports and orders were unreasonable and unduly prejudicial. These complaints sought a modification of that portion of the Commission's findings which required the exclusive use of proportional rates from the rate-break markets as the outbound basis of charge on shipments transited there. The complaint was because of lack of transit at certain primary markets under proportional rates from other primary markets in instances where the complaining primary markets were intermediate points on indirect routes. Inasmuch as this is the same subject matter as that here before the Court, it is necessary, as a clarifying background, to review the relevant findings in the several reports in the *Grain* case and to explain the reasons upon which those findings rest.

The prescribed rate-break combinations

The system of rate-break combinations, consisting of graded in-bound rates from the country origins to the various western primary markets and sensitively related, separate proportional rates for the out-bound movement from those markets, prescribed for application, in lieu of one-factor through rates, upon the huge volume of grain originating in the western producing regions, was one of the most important and far-reaching adjustments in the Western District. It was prescribed for application from shipping points in Minnesota, the Dakotas, Montana, Iowa, Nebraska, Kansas, Missouri, Oklahoma, Texas, Colorado, and Idaho, embracing both the spring and the winter wheat belts, to such great markets as Minneapolis, Duluth, Omaha, and Kansas City, and from those markets to destinations in the Southwest, to Gulf ports for coastwise and export movement, and to Chicago, Peoria, Cairo, St. Louis, and Memphis as destination points and as gateways to the East and Southeast.

These combinations, or one-factor through rates equivalent thereto, were prescribed as the charge for transportation between the origins and destinations mentioned, whether the shipments moved over routes through the market or over more direct routes not touching the market.[5]

Transit is an integral part of the rate structure ordered, and certain rules and practices affecting it were prescribed in this proceeding. Indeed, the transit practice is so intimate a part of the grain-rate structure itself that the particular kind of structure adopted by the Commission was one intended, among other objectives, to remedy evils incident to the practice as followed at the primary markets. It will aid in clarification to explain the general nature of the transit privilege.

The transit privilege

Under the transit privilege, a commodity may be shipped from a point of origin to a named destination, there delivered to the consignee, and, after merchandising or processing, the same commodity or its equivalent or its manufactured product may be forwarded to a final destination at a total transportation charge less than the sum of the rates to and from the point of stoppage which would be applicable in the absence of the privilege.

The practice rests upon the fiction that the in-bound and out-bound shipments, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. The effect of the practice is to accord to shippers a more favorable basis of rates than would obtain if the in-bound and out-bound movements were treated

[5] From points in Oklahoma to St. Louis, for example, there are certain routes which pass through Kansas City, and there are also more direct routes which do not touch that market. Whether the shipments move over one route or another, the basis of charge is the prescribed Kansas City rate-break combination. This adjustment enables the primary market to draw in and handle grain at a rate equivalent to that obtained by grain dealers located at "interior" points—points which are not classed as primary markets or rate-break points—located on the more direct routes. (R. 307; see also R. 308-310.)

as separate shipments. The bases of rates under the privilege and rules and regulations governing its application are required by the provisions of the Interstate Commerce Act and the regulations of the Commission to be published in the carriers' tariffs.

The tariffs of all railroads serving the primary markets provide for transit on grain at these markets and have so provided for many years. When the grain moves in from the point of origin to the primary market, it is billed to a named consignee. The car is delivered; the freight charges are paid, a receipted freight bill showing the point of origin, rate paid, etc., is rendered, and the movement of the in-bound shipment ends.* The ultimate destination of the grain or its product is then (usually) unknown. With the exception of the relatively small volume consumed locally, the grain or its products are ultimately reshipped. If the freight or expense bill covering the in-bound shipment is registered with the carriers' transit bureau, it may be surrendered to the carrier in connection with a subsequent out-bound shipment, in order to avoid the payment of a combination of local rates and obtain the application of a lower basis of rates under the transit privilege, based on the fiction of a continuous movement, provided the out-bound shipment is made within a period of one year (subject to extension to two years) from the date of the surrendered freight bill. See R. 41–42, 44, 46, 61–62, 319–320, 404–405, 538–540; cf. *The Transit Case*, 24 I. C. C. 340.

The carriers' tariffs also provide for transit at many lesser markets and mill and elevator points in the western territory, herein termed "interior" points, and, generally speaking, the transit practice as followed at such points is similar in principle to that followed at the primary markets, but, as shown more fully hereinafter, the rules and regulations governing the transit at such points are far less liberal than those applicable at the primary markets and the bases of charge are different.

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*Cf. *A., T. & S. F. Ry.* v. *United States*, 279 U. S. 768, 777–778.

The prescribed rate-break combinations were required as the exclusive basis of charge upon shipments transited at the primary markets, in order to correct the objectionable and unlawful features of the dual system of rates previously available at those markets upon traffic transited there

The Commission's investigation disclosed that there was then in existence a "dual system" of rates applying on grain moving through the primary markets, consisting of (a) *rate-break combinations*, under which transit was granted at the markets; (b) *overhead through rates* from the country origins to the final destinations applicable via the markets, under which transit was also granted at the markets.

(a) *Rate-break combinations.*—These combinations were composed of local or "flat" rates from the country origins to the market and proportional rates from the market to destination. The local or flat in-bound rates were the only rates in effect upon the in-bound movement from the country origins to the market; they applied whether the grain was to be consumed at the market or whether it was later to be reshipped from the market. The out-bound proportional rates were applicable only on grain which had "originated beyond" the market and had moved to the market by rail. They were applicable on continuous through shipments over routes passing through the market; and also on shipments which had moved into the market by rail, there accorded the transit privilege, and subsequently reshipped, provided the rules governing the transit privilege were complied with, including the requirement for the surrender of an appropriate in-bound expense bill. In the event of noncompliance with the transit rules, the out-bound shipment would be charged a local or flat out-bound rate substantially higher than the out-bound proportional rate.[7]

Thus, in the case of the rate-break combinations the lower basis of rates under transit is the out-bound proportional rate,

[7] From Omaha to Chicago, for example, the out-bound proportional rate was 17.5 cents, whereas the local rate was 23.5.

since that rate is substantially lower than the out-bound local or flat rate which would apply if the transit privilege were not available and if the in-bound and out-bound movements were treated as separate shipments.

(b) *Overhead through rates.*—These were one-factor rates applying from the points of origin to the final destinations (or to gateways en route to the final destinations), over lines or routes passing through the primary markets.[8] The carriers' tariffs also provided for transit at the primary markets under these overhead through rates. Where transit was had under such rates, the in-bound shipment would move to the market under the local or flat rate from the point of origin, and the out-bound shipment would move at the balance of the through rate, i. e., the difference between the in-bound rate and the overhead through rate. This difference or balance is called the *transit balance.*

Thus, whether transit at the primary market was had under a rate-break combination or under an overhead through rate, the in-bound shipment would pay the applicable in-bound local or flat rate. The difference in charge under the two forms of transit was in the out-bound factor. Where transit was had under the rate-break combination, the out-bound shipment would move at the proportional rate; where it was had under an overhead through rate, the out-bound shipment would move at the transit balance.[9]

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[8] The term "overhead through rate" means no more than a one-factor rate from a point of origin to a destination applying via a particular point. For example, Kansas City would speak of a one-factor through rate from Dodge City to Chicago over the Santa Fe as being an "overhead through rate" because it applied via Kansas City.

[9] For example, the overhead through rate from Enid, Okla., to Chicago, prior to July 1, 1935—the effective date of the readjustment prescribed by the Commission—was 38.5 cents. This rate was applicable over a route passing through Kansas City and under it transit was permitted at Kansas City. When transit was taken at Kansas City the local rate from Enid to Kansas City of 23.5 cents would be paid upon the in-bound shipment. This rate, subtracted from the overhead through rate of 38.5 cents from Enid to Chicago, left a transit balance of 15 cents as the transportation charge upon the out-bound shipment from Kansas City to Chicago. The

As is made clear in the Commission's reports, the conditions under which transit is granted under overhead through rates are different in many respects from those governing transit under rate-break combinations. The conditions are so different that transit under the one is spoken of as a different form of transit from that under the other. These differences are explained fully hereinafter. Here the fundamental difference in the basis of charge is to be noted. In the case of transit under an overhead through rate, the inbound shipment moves at the flat rate from the point of origin to the transit point. In this respect the practice is the same as in the case of transit under a rate-break combination. But, in sharp contrast to transit under the rate-break combinations, the outbound shipment under transit on overhead through rates moves at the transit balance.

The existence of this dual system of rates was noted in the Commission's first report and some of its incidents were explained (164 I. C. C. 619, 633 et seq.; R. 42 et seq.). "For many years through rail rates on grain and grain products have been largely the combinations of flat rates to and proportional rates from the primary markets, or the so-called rate-break combinations." (Ib., 634, R. 42.)

"The rate-break through primary markets is not exclusively employed, however.[10] There are, as stated, many overhead through rates with transit at the primary markets lower than the combinations on the primary markets and, therefore, many transit balances less than the proportional rates." (Ib., 636, R. 44.)

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proportional rate from Kansas City to Chicago was then 17.5 cents (R. 311). Thus, a shipper at Kansas City who had on hand a freight bill covering a shipment from Enid could defeat the proportional rate of 17.5 cents by surrendering that freight bill and thereby obtain his transportation to Chicago at 15 cents. Another shipper, not having on hand such a bill, would be compelled to pay the proportional rate.

[10] That report spoke as of July 1, 1930. The exclusive rate-break method decided upon by the Commission and now in force became effective July 1, 1935.

After explaining that all shipments to the markets, with certain minor exceptions, were billed in at flat rates, the Commission pointed out the varying bases of charge upon the out-bound shipments. "Whether out-bound shipments are at proportional rates or transit balances depends upon the selection of the in-bound freight bill. If the in-bound freight bill covers a shipment from an origin point from which there is no overhead rate with transit to final destination, the out-bound shipment is at the proportional rate. But grain from a point from which there is no overhead rate with transit can, under present practice, be substituted for grain from a point from which there is such an overhead rate with transit, and can be forwarded, upon presentation of the inbound expense bill covering in-bound transportation from the latter point, at the transit balance due that expense bill. *The transportation service, recording of freight bills, keeping of records, and all incidents of the entire transaction of shipment to and from the primary market are the same whether the out-bound shipment is at the transit balance or the proportional rate*" (164 I. C. C. 634; R. 42). [Italics ours.]

The overhead rates, the Commission said, "apply through markets on both direct and indirect routes. The proportional rate from one primary market to another is frequently made applicable with transit at an intermediate primary market, in lieu of the combination of proportional rates to and from the intermediate market." (Ib., 636; R. 44.)

After citing 11 typical examples of transit balances on wheat, the Commission then explained that *such transit balances applied on any grain in the primary market elevator, upon surrender of the required in-bound billing.*

"For example, the rate on through shipments of wheat from Kansas to Chicago is the flat rate to Kansas City, plus the proportional rate of 17.5 cents beyond, but Kansas wheat stopped at Kansas City for merchandising, milling, or other purpose, may move out of Kansas City to Chicago at 9.5 cents upon surrender of an expense bill showing the in-bound

shipment of an equivalent amount of wheat from Omaha to Kansas City." (Ib., 638, R. 46.)

At the time of the report the proportional rate from both Omaha and Kansas City to Chicago was 17.5 cents, and the proportional rate from Omaha to Kansas City was 8 cents. The transportation charge of 9.5 cents at which the shipment moved from Kansas City to Chicago was the transit balance of the proportional rate of 17.5 cents from Omaha to Chicago, applied with transit at Kansas City.[11]

This dual system of rates, under which the large terminal markets had at their command for application upon out-bound shipments to numerous important destinations and gateways, both proportional rates and a multitude of varying transit balances lower than the proportional rates, was condemned by the Commission as improper and unlawful. Upon the above and other findings of fact and full discussion it found and concluded (R. 41–53):

> We find that the practice of contemporaneously charging both proportional rates and transit balances subjects the shipper under proportional rates to undue prejudice and disadvantage, and gives to the shipper under the lower transit balance an undue preference and advantage, from which the carriers will be required to cease and desist; that the through rates herein prescribed, on the basis of flat rates to the primary markets and proportional rates beyond, will be reasonable; and that

[11] In other words, the 17.5-cent rate from Omaha to Chicago, besides applying over direct routes, also applied over an indirect route via Kansas City. The in-bound shipment from Omaha to Kansas City would pay 8 cents. Upon the outbound shipment from Kansas City, transportation could be obtained to Chicago at 9.5 cents, the transit balance of the Omaha-Chicago rate, notwithstanding that the proportional rate from Kansas City to Chicago was 17.5 cents. However, a shipper in Kansas, shipping direct to Chicago, could not by any such switching of bills obtain transportation at less than the regular rate, i. e., the full combination on Kansas City composed of the flat rate *in-bound* and the full proportional of 17.5 cents out-bound. It was the purpose of the Commission's order to correct such rate inequalities as these.

overhead through rates less than those combinations should be canceled. (164 I. C. C., 645; R. 53.)

This finding was subject to certain exceptions to permit carrier competition, as shown more fully hereinafter (R. 53).

Upon rehearing there was additional evidence and consideration anew by the Commission upon the important issue as to the nature of the structure of rates through the primary markets. In the report on rehearing, 205 I. C. C. 301, 327–342 (R. 303–321), the Commission fully reviewed the whole subject. It gave the following six reasons for its requirement of the exclusive application of the rate-break combinations:

"The main reasons for the requirement of the exclusive application of the rate-break combinations were that transit balances less than the proportional rates out of the rate-break markets tended to disrupt the rate-break combinations, disorganize the general rate structure, make uncertain in advance the out-bound basis of charge, give an undue preference to the users of transit balances over the users of proportional rates, depress the price of grain at the rate-break markets, and, by direct reflection, at the country points, and reduce the revenues of the carriers." (205 I. C. C., 334, R. 311.)

These reasons were elaborated in the succeeding paragraphs (R. 311–313). "The disruptive effect of transit balances on the rate-break combinations," the Commission explained, "becomes evident when it is remembered that a one-factor through rate takes precedence over any combination of intermediate rates, and that the transit balance incident to such a through rate takes precedence over the proportional rate used in the rate-break combination."

In its original report the Commission found that "The transit balance at primary markets has always been a source of disorganization of rates. * * * Just so long as transit balances remain a substantial factor in the adjustment of rates from the primary markets, just so long will there be undue preferences between out-bound shippers, as well as general instability in rates," and that "a return as closely as practicable" to the com-

bination basis, previously in effect, "would go far toward eliminating much of the complaint that has arisen from time to time concerning the relation of rates through the various primary markets. The best interests not only of the primary markets, but of the producer, consumer, and carrier will be served by the fullest possible application of the rate-break combinations through primary markets" (164 I. C. C. 644–645; R. 52–53).

"The unsettling effect upon the rate-break combinations of one-factor through rates less than those combinations is illustrated by the situation that gave rise to the original proportionals," the Commission said, and it then traced the history of the proportionals, ending with the observation: "Sometimes the out-bound movement is exclusively on transit balances, and the proportional rates become proportionals in name only. The opportunity is then presented to ask for a reduction in the proportional rates down to the basis of the average transit balance" (R. 312).

It then explained the last two reasons, which are of even greater importance:

"The uncertainty in advance as to the out-bound basis of charge arises from the dependence of that charge upon a check of the individual shipper's range of in-bound billing. The out-bound charge will be a transit balance if the in-bound freight bill surrendered covers a shipment from an origin from which there is a one-factor through rate less than the rate-break combination, and will be the higher proportional rate if the in-bound freight bill surrendered covers a shipment from an origin from which there is no such one-factor through rate. Transit balances will vary with the measure both of the through rates and of the in-bound rates to the transit point.

"The advantage to the user of the transit balance over the user of the higher proportional rate is evident, and increases in the ratio of the increase in the storage capacity of the respective cash-grain dealers at the rate-break markets. In other words, the greater the storage capacity the wider the selection of in-

bound billing and proportionately more transit balances" (205 I. C. C., 334–5, R. 311–313).

It was possible to correct the objectionable features of the dual system by prescribing either overhead through rates exclusively, carrying the transit privileges; or rate-break combinations exclusively, under which transit would be granted on the basis of the fixed, constant, unvarying outbound proportional rates; and the question as to the character of the rate system was one of the important issues in the proceeding (R. 47).

"*The primary markets want the rate-break,*" the Commission said (italics ours), and some of them also wanted overhead through rates less than the rate-break combinations in some instances. Kansas City especially advocated "the fullest possible application of its out-bound proportional rates [the distinctive feature of the rate-break combinations], not only as a preserver of Kansas City as a futures market, but as a stimulator of the futures price, and therefore of the directly related cash price paid to the producer."[12] (164 I. C. C., 640; R. 48.) Other shippers and State Commissions favored the rate-break.

After fully reconsidering the question upon rehearing, the Commission affirmed the original finding that *the rate-break combinations must be the exclusive basis of charge on shipments through the rate-break markets* (R. 321).

The exceptions to permit carrier competition as made in the original report, 164 I. C. C., at p. 645 (R. 53), and in the report supplemental thereto, 173 I. C. C. 511, 515 (R. 239–241), were adhered to (205 I. C. C., 342; R. 321).

On page 643 of the original report (R. 51) the Commission made this significant statement: "It is believed that making rates through primary markets exclusively by combination of flat rates to and proportional rates from the markets, would not only preserve, but would substantially increase, carriers'

[12] The price paid to the producer is the price at the primary market minus the freight from the point of production (R. 51).

revenues, even with substantial reductions in both the in-bound flat rates and the out-bound proportionals, because of the discontinuance of transit balances much lower than the proportionals."

This observation foreshadowed the action then taken, which was affirmed on rehearing. The Commission reduced both the in-bound flat rates and the out-bound proportionals, with the requirement that the rate-break combinations composed of such reduced in-bound and out-bound rates should be the exclusive basis of charge, all overhead through rates to the points to which the proportional rates were prescribed to be canceled, to the end that there would be no lower transit balances to cut under the reduced proportional rates ordered. It also aligned the in-bound flat rates and the out-bound proportional rates so that all producing areas, carriers, markets, transit points, gateways, and destinations would have reasonable rates and reasonable rate relations, having due regard to distances and other transportation conditions.[13]

Reduced proportional rates prescribed by the Commission from primary markets were fixed at a level approximating the average of transit balances under reasonable overhead through rates

That this was the Commission's method of determining the levels of the reduced proportional rates is clearly shown by the

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[13] The in-bound flat rates and out-bound proportional rates prescribed by the orders are shown in the appendix to the report on rehearing (proportional rates, R. 490–491; in-bound flat rates, R. 492–524), except that some of the rates there shown were modified in the supplemental report of March 4, 1936 (215 I. C. C. 83, R. 528–584). The prescribed in-bound flat rates to the markets and the prescribed out-bound proportional rates from the markets, added together, form the prescribed rate-break combinations, which constitute the aggregate rail transportation charges from the country origins through the primary markets to important secondary markets and destinations.

For example, the prescribed in-bound flat rate from Beloit, Kans., to Kansas City is 16 cents (shown at p. 497, report 205 I. C. C., R. 502). The prescribed proportional rate from Kansas City to Chicago is 15 cents (shown at p. 486, report 205 I. C. C., R. 490), resulting in a rate-break combination on Kansas City from Beloit to Chicago of 31 cents.

report on rehearing (205 I. C. C. 328, R. 305): "The rate-break combinations on the Missouri River markets from Kansas, Nebraska, and other western States to Chicago and St. Louis were the result of first checking in reasonable through rates from the origin key points to the final markets, over the direct routes through the Missouri River markets, and then breaking them back into in-bound local rates to the latter markets and proportional rates beyond, on the basis of average relative mileages, resulting in proportional rates approximating the average transit balances that would have resulted if one-factor through rates with transit, in lieu of the rate-break combinations, had been prescribed. The rate-break combinations on Minneapolis from North Dakota and other northwestern States to Chicago, over direct routes through Minneapolis, also respond to this test."

Examination of the rate tables in the appendix to the report (205 I. C. C. 486–510, R. 490–524) will show that the prescribed rates, generally speaking, were substantial reductions from the carrier-made rates previously in force. A few of the reductions in typical proportional rates, upon which a large volume of traffic moves, may be mentioned: Kansas City, Omaha, and Sioux City to Chicago, 17.5 to 15 cents. Kansas City to St. Louis, 13.5 to 11 cents. Omaha to St. Louis, 13.5 to 13. Sioux City to St. Louis, 17.5 to 16. Between Omaha and Kansas City, 8 to 6 cents. Between Omaha and Sioux City, 5 to 3 cents. Minneapolis and Duluth to Chicago, 13 to 12 cents.

It is clear appellants wish to retain the benefit of these reduced proportional rates, which represent the averages of transit balances under reasonable through rates, and, in addition, obtain transit balances much lower than the proportionals from such highly important primary markets as Minneapolis, Omaha, and Kansas City to important destinations such as Chicago and St. Louis.

To permit carrier competition, certain exceptions were made to the rule for the exclusive application of the rate-break combinations

The primary markets, as we have seen, are accorded liberal transit privileges under the rate-break combinations. Kansas City and Omaha, for example, can draw in grain over any railroad from Nebraska, Kansas, Oklahoma, Missouri, Iowa, and other grain producing areas, and reship over any route to Minneapolis, Chicago, St. Louis, Memphis, and other points under the reasonable rate-break combinations prescribed by the Commission.

No difficulties or complications would be experienced if all the traffic moved over direct routes not passing through a second primary market. As previously shown, the Commission required the exclusive application of the rate-break combinations on all traffic transited at the rate-break markets. It also required the application of those combinations on traffic moving over routes passing through those markets whether the traffic was transited there or not (cf. 215 I. C. C., 87, R. 535). To illustrate: A shipment from Holdrege, Nebr., to Omaha, there transited, and reshipped to Chicago would take the Omaha rate-break combination: 16.5 cents in, 15 cents out, or a total of 31.5 cents. A continuous shipment from Holdrege to Chicago via Omaha would likewise take the Omaha rate-break combination of 31.5 cents, or a single-factor through rate equal thereto.

If all such traffic moved through to Chicago over the direct routes there would be no need for exceptions to the rule for the exclusive application of the rate-break combinations. There are, however, indirect routes as well as direct routes between these points. Altogether there are 21 rail routes between Omaha and Chicago. (See Commission's answer, R. 670–671.) Most of these routes do not touch Kansas City. This is true of the single-line routes of the Chicago & North Western; Chicago, Burlington & Quincy; Chicago Great Western; Chicago,

Milwaukee, St. Paul & Pacific; Chicago, Rock Island & Pacific; Illinois Central; Wabash. A few of the routes do pass through Kansas City. This is true, for example, of the route formed by the Missouri Pacific and the Santa Fe. The former has a line from Omaha to Kansas City but none to Chicago; the latter has a line from Kansas City to Chicago but does not reach Omaha. Together their lines form a route from Omaha to Chicago via Kansas City, and they desire to participate in the Omaha-Chicago traffic. If the rule for the application of the rate-break combinations were applied without exception, a shipment from Holdrege to Omaha over the Burlington, thence over the Missouri Pacific and the Santa Fe via Kansas City to Chicago would take the prescribed combination on both Omaha and Kansas City of 37.5 cents (16.5 cents Holdrege to Omaha, 6 cents Omaha to Kansas City, 15 cents Kansas City to Chicago), or 6 cents higher than the rate of 31.5 cents over the direct routes from Holdrege to Chicago through Omaha but not Kansas City. Such a competitive disadvantage of 6 cents would preclude the Missouri Pacific, the Santa Fe, and other carriers similarly situated from obtaining any of the traffic.

In its first report the Commission made an exception to the exclusive rate-break method in order to permit carrier competition in these circumstances. It said that its finding requiring the exclusive application of rate-break combinations "is not intended to prevent carrier competition that does not disrupt the basis of making rates by combination on the primary markets." (164 I. C. C., 645, R. 53.) "Thus," the Commission said, "the combination on a given market may be applied as a through rate through another market on which the combination is higher than on the market first mentioned, provided that the shipment is not stopped in transit at the market or other intermediate point on the route over which the higher combination obtains; but if the shipment is stopped at either the market or other intermediate point on the latter route, the higher combination must be applied."

Under this exception to the rule, the combination on Omaha of 31.5 cents could be applied as a through rate over the route through both Omaha and Kansas City, in order to meet the competition of the carriers forming the direct route through Omaha, provided the shipment moved through without stop for transit.

Similarly, the Commission said, "a proportional rate from one market to another may be applied over a competitive route through a third market on which the combination is higher than over the direct route, provided the shipment is continuous, but the higher combination of proportional rates to and from the third market will be applied on shipments stopped there or at any other intermediate point for transit purposes on that route." (164 I. C. C., 645, R. 53.) [14]

In its first supplemental report (173 I. C. C.; R. 240), the Commission stated that "the purpose of the finding is to prevent the defeat of the proportional rate by a transit balance lower than the proportional, but not otherwise to curtail carrier competition." Under the finding the Omaha-Chicago proportional rate of 15 cents, for example, could be applied over an indirect route through Kansas City, *provided the shipment were not stopped for transit at Kansas City.* If it were so stopped, and transit were allowed under the Omaha-Chicago proportional rate of 15 cents, there would be available to the Kansas City operator a transit balance of 9 cents to Chicago—the difference between the 6-cent in-bound rate from Omaha to Kansas City and the rate of 15 cents from Omaha to Chicago applying via Kansas City. Such a transit balance could be used on wheat originating in Kansas (or elsewhere), e. g., Dodge City, with the result that the Kansas City operator could obtain transportation from Dodge City to Chicago at a charge of 29 cents, made up of the in-bound local rate of 20 cents from Dodge City to Kansas City, as prescribed by the Commission

[14] As shown hereinafter, these findings were later modified so as to permit transit at intermediate points other than rate-break points.

(see 205 I. C. C., 497, R. 504), plus the transit balance of 9 cents from Kansas City to Chicago, whereas the rate prescribed by the Commission from Dodge City to Chicago is 35 cents, composed of the local rate of 20 cents to Kansas City plus the proportional rate of 15 cents beyond.

The use by the Kansas City operator of the 9-cent transit balance would thus defeat the prescribed reasonable proportional rate of 15 cents. But if the Omaha-Chicago 15-cent proportional rate is allowed to be applied for *continuous* movement over the routes through Kansas City, *simply in order to permit carrier competition*, there is no possibility of defeating the proportional rate of 15 cents from Kansas City to Chicago by a lower transit balance, and Kansas City is not damaged because the Missouri Pacific and other carriers similarly situated are allowed to participate in the traffic from Omaha to Chicago on a competitive basis with the other carriers serving these points.

In the same report the exception to the rule was broadened to the extent of permitting transit at an intermediate interior point located on *both* a direct route and an indirect route. To illustrate: Fort Dodge, Iowa, is on the direct, single-line route of the Illinois Central from Sioux City to Chicago, which does not pass through Omaha or any other rate-break market. Fort Dodge is also served by the Chicago Great Western and the Minneapolis & St. Louis. The latter roads, in connection with other lines, form routes from Sioux City to Chicago, via Omaha, competitive with the Illinois Central. A typical route would be, Chicago & North Western from Sioux City to Omaha, thence Chicago Great Western to Chicago, passing through Fort Dodge. Under a strict application of the rate-break rule, these latter routes would be compelled to charge a combination of 18 cents from Sioux City to Chicago—3 cents from Sioux City to Omaha plus 15 cents from Omaha to Chicago. Under the original exceptions to the rule to permit carrier competition, these competitive roads

could put in force the Sioux City-Chicago rate of 15 cents over their route, instead of the Omaha rate-break combination, in order that their rate might be the same as that of the Illinois Central. But, if the Illinois Central granted transit at Fort Dodge and the competitive routes failed to meet this action, they would still be under a competitive disadvantage, because the rate over the Illinois Central, with transit at Fort Dodge, would be 15 cents, whereas the rate over the competitive route would be a combination aggregating considerably higher than 15 cents. Therefore the Commission ruled that the competing carriers, with a route through Omaha, desiring to meet the competition of the direct-route carriers, could do so fully, not only by establishing the same competitive rate but also by granting the same transit privileges under that rate as the direct-route carriers granted. (See 173 I. C. C. 516–517; R. 240.) As stated in the Commission's original report (R. 61), transit is a common practice at both market and interior milling points, and it is accorded in connection with both flat and proportional rates. There are many interior milling and elevator points in the territory in question. Such points have always had transit, and no one seriously suggests that it should be taken from them. The combinations of rates which would apply in the absence of transit would be prohibitively high. But the rate-break combinations prescribed by the Commission do not apply to and from these interior points; they apply only on traffic to and from the primary markets. No such combinations of locals in and *proportionals* out are in effect at interior points. Several interior points, including Wichita, Kans., and Des Moines, Iowa, have sought to secure the establishing of proportional rates for application upon the movement of outbound grain traffic, but the Commission has declined to order their establishment.

Lacking such a system of rates, mill and elevator operators at interior points can stop and reship traffic at rates lower

than the local rates in and out only in instances where there is in effect a one-factor rate applicable via the interior point. (In certain instances, they can secure transit on a one-factor through rate not applying over a route via the transit point, but only upon the payment of extra charges for the "out-of-line-haul" from the nearest point on the route to the transit point and back again.)

In all instances where the interior points obtain transit, they pay the local rate to the transit point and the transit balance upon the out-bound shipment. Ordinarily, under that form of transit, the out-bound shipment must move from the transit point over the line of the in-bound carrier, otherwise the higher combination of local rates to and from the transit point, instead of the lower through rate, is applicable (a one-factor through rate is usually lower than any combination of intermediate rates).

Upon petitions for modification, further consideration was given to matter of transit at interior points on routes through rate-break markets

In the report of March 4, 1936, on rehearing, 215 I. C. C., 83 (R. 526–584), the Commission further considered, upon petitions for modification, the question of transit at interior points on routes through rate-break markets (R. 536–542). In these petitions it was urged that the main purpose of the findings in respect of the rate-break combinations—to require the exclusive application of the proportional rates on shipments from the rate-break markets to destinations to which such rates are published—would not be violated by broadening the exception allowing carrier competition so as to permit transit at interior milling and elevator points on a route through an intermediate rate-break market, in order to meet the rate over the competitive route between the same points, *irrespective of whether the interior points on the competitive route are also transit points on the direct route.*

The Commission, after expressing the view that "A modification on the basis suggested would have to rest upon a substantial difference in conditions affecting the interior transit points and the rate-break markets" (215 I. C. C., 90, R. 538), found:

(1) That such a difference in conditions exists;

(2) That the suggested modification would remove discriminations between interior transit points themselves;

(3) That under the suggested modification the transit operator at the rate-break market on the equalized route would not be relatively more affected by transit at interior points on that route than by transit at points on the cheaper routes.

1. Determination as to the existence of difference in conditions affecting the interior transit points and the rate-break markets, the Commission said, required a comparison of the incidents of transit as accorded at the interior transit points and at the rate-break markets. The Commission first considered transit on a one-factor through rate, the only form of transit open to the interior points, and then considered transit under the rate-break combinations, and the difference in the effects of the transit operation under the two bases of through charge. It found that the restrictions on transit under one-factor through rates places a decided limitation upon the freedom of interchange of shipments between carriers serving the interior points, that the transit under the rate-break combinations gives a substantial advantage to the transit operators at the rate-break markets, that transit under one-factor through rates and under the rate-break combinations are two essentially different bases of rates, that under the restrictions of transit under one-factor through rates the volume of grain available to the interior transit operator is not comparable with the volume available to the rate-break market under the unrestricted routing permitted by the rate-break combinations (215 I. C. C., 90–92, R. 538–540).

2. The Commission found that the suggested modification *would remove discriminations between interior transit points themselves.* It referred, as an example of such discrimination,

to that then existing between Hastings, Minn., and Watertown, Wis., resulting from the grant of transit at Watertown and its denial at Hastings, under the proportional rate of 12 cents from Duluth to Chicago. Hastings is 50 miles southeast of Minneapolis on the route of the Chicago, Milwaukee, St. Paul & Pacific from Duluth to Chicago. This route is via Minneapolis; traffic over the route must pass through Minneapolis. For this reason the rate from Duluth to Chicago on grain transited at Hastings was the Minneapolis rate-break combination of 16.5 cents—4.5 cents Duluth to Minneapolis, and 12 cents beyond.

Watertown, Wis., is approximately 46 miles west of Milwaukee. Like Hastings, Minn., it is on the route of the Chicago, Milwaukee, St. Paul & Pacific between Duluth and Chicago. Watertown is also on the route of the Chicago & North Western between Duluth and Chicago, which does not pass through Minneapolis. Because of this latter fact, Watertown was permitted to transit on the Duluth-Chicago 12-cent rate. Both Watertown and Hastings are interior points. Neither is a rate-break point. Neither has the advantages of transit under proportional rates. Under these circumstances, to grant Hastings transit on the 12-cent rate would remove discrimination against it in favor of Watertown (R. 540–541).

3. The Commission further found that under the suggested modification, "the transit operator at the rate-break market on the equalized route would not be relatively more affected by transit at interior transit points on that route than by transit at points on the cheaper route." This may be illustrated by the situation then existing at Rush City, Minn. (See 215 I. C. C., R. 541.)

Nor would the competitive situation of the transit operator at the rate-break market be changed in certain instances in which transit has been accorded at interior transit points on the normal route through the rate-break market, as a result of diversion of the shipments over an available route that barely skirts the outer edge of the rate-break market, in order to escape

the requirement of the exclusive application of the rate-break combination, the Commission found (215 I. C. C., 93, R. 541).

The ultimate conclusion reached by the Commission in respect of the suggested modifications was as follows (215 I. C. C. 93, R. 541): "In view of the foregoing considerations, the previous findings and orders are modified to permit of trans . in the discretion of the carriers, at interior transit points on a route through a rate-break market, as those points are hereinbefore defined, on the basis of a lower rate in effect over a competing route between the same points, in order to equalize those points with transit points on the cheaper route, regardless of whether the interior transit points on the equalized route be also transit points on the cheaper route. On all shipments stopped in transit at the rate-break market on the higher-rated route the rate-break combinations will apply. On shipments not stopped in transit at any point on that route the equalization with the cheaper route may be permitted, in accordance with the previous findings."

Formal complaints of the primary markets

After the issuance of the above-mentioned reports, formal complaints were filed with the Commission by certain interests at primary markets. (See Commission's answer, R. 673-674.) Hearings were held upon these complaints, followed by submission of briefs by complainants and numerous interveners, and oral argument before the Commission. The evidence submitted disclosed the facts in great detail. A certified copy of it (7,061 pages of testimony and 252 exhibits) was introduced below and is here as an original exhibit (R. 709, 766–767).

July 27, 1937, the Commission issued a report, 223 I. C. C. 235 (R. 613–633), finding that the evidence did not justify the issuance of a mandatory order requiring the additional transit sought, but concluding that the carriers should be permitted to file tariffs which would authorize restricted de-

partures from the exclusive application of proportional rates at rate-break markets for a limited period of time (R. 626–627).

The granting of this temporary permission was opposed by various parties. Petitions asking the Commission to reconsider its decision were filed by the State regulatory commissions of Kansas, Montana, and North Dakota, also by various private interests in those States. Certified copies of these petitions, introduced in evidence below, are here as original exhibits (R. 627, 718).

The situation is stated clearly in the petition of the Kansas Commission, which is quoted in part below.[15]

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[15] The purpose of prescribing rates upon the rate-break system was to correct an intolerable situation which had grown up through the manipulation of billing on shipments accorded transit privileges at points from which proportional rates applied. * * *

In prescribing (*Grain and Grain Products, supra*) for exclusive application, fixed proportional rates for the movement of grain and grain products from Kansas City and the other terminal markets, the Commission sought to arrive at a fair average of the out-bound balances which would apply, if transit at through rates were permitted at the terminal markets. It follows, therefore, that in some cases these fixed proportional rates are somewhat higher, and in other cases somewhat lower, than the out-bound balances would have been under transit at through overhead rates. Under the dual system of proportional rates now made possible by the findings and order in these proceedings, the terminal markets will be able to use the proportional rates where such rates are lower, and to use the varying balances where they result in lower charges. To permit such an alternative seems to this petitioner an illogical mixing of the two rate plans and to provide an unfair advantage to the terminal markets.

The fixed proportional rates resulting from the rate-break plan afford marked advantages to the terminal markets from which the fixed proportionals apply. Complainants in these proceedings sought to retain all the advantages of the rate-break plan and ask also that they be relieved of what they considered to be a disadvantage incident to the plan. * * *

If the rates permitted by the modification made July 27 are made available to the Missouri River markets, interior millers and grain dealers will be put to a disadvantage of as much as 6 cents per 100 pounds in reaching Eastern, Southern, and Southeastern markets in competition with the Missouri River points. Under the highly competitive conditions now existing and with the manipulation of billing which would be possible if the terminal markets were granted transit in accordance with the permissive

The affected carriers decided after careful consideration not to establish the additional transit, for the reasons that it would have the result of reestablishing the dual system of rates at the primary markets which had been condemned by the Commission, would make available transit balances lower than the reasonable proportional rates prescribed by the Commission, would greatly reduce the already inadequate revenues of the carriers, and would jeopardize the entire rate structure and the ability of the carriers to perform service to the public required of the transportation agencies. (See reply of defendant carriers dated April 28, 1938, to petitions for reconsideration, here as part of original Ex. No. 12.)

In April 1938 appellants filed petitions asking that the Commission enter a mandatory order requiring the carriers to establish the additional transit in question. The Commission reopened the proceedings, heard further oral argument, and on July 12, 1938, issued a further report, 229 I. C. C. 9 (R. 635–646), finding and concluding that "the present adjustment of rates on grain and grain products throughout the western district does not subject the rate-break markets on indirect routes to undue prejudice and disadvantage and give to points on the same or other routes an undue preference and advantage" (R. 644). An accompanying order (R. 647), dismissed the complaints.

In October and November 1938 appellants filed petitions for reopening and reconsideration, which were granted. The Commission heard further argument. March 13, 1939, it issued a

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order, the interior points, in many cases, will be effectually barred from Eastern and Southeastern markets.

Over a long period of years the Kansas Commission and the Kansas wheat growers, and, generally, the Kansas grain and milling interests have supported a policy of fostering a strong and flexible grain market at Kansas City and other Missouri River points. That attitude remains unchanged. But in the matters here in issue the Kansas Commission believes that the establishment of the adjustment made possible by the permissive order will give an unfair advantage to such terminal markets and result in substantial and serious damage to the great body of Kansas wheat producers and the grain and milling interests.

further report, 231 I. C. C. 793 (R. 648–654), reaching the conclusion that reconsideration of the record in the light of the last argument did not afford ground for modifying its previous findings (R. 652).

Respecting rate situations set out in appellants' brief

In their brief, at pp. 20–23, appellants set out five rate situations which they say are illustrated by charts introduced by them in the court below (R. 723–728).

The charts are misleading in several respects. They show only a few of the many routes. There is no proof that transit is granted under the rates in question without extra charge at all the interior points on the *indirect* routes shown on these charts. The chart purporting to depict the Iowa-to-St. Louis situation is particularly inaccurate, in that it fails to show the Iowa points as being reached and served competitively by both the Chicago, Burlington & Quincy and the Chicago, Rock Island & Pacific.

In respect of each and every one of the rate situations dealt with in appellants' brief, there is this fundamental fact, not stressed by appellants: Action by competitive carriers whose routes pass through rate-break points to meet the rate of direct routes not passing through a rate-break point. Their complaint does not embrace any other situation.

In respect to the rates. The Commission's orders prescribed proportional rates of 15 cents from Omaha to Chicago, 15 cents from Kansas City to Chicago, 13 cents from Omaha to St. Louis, and 6 cents between Omaha and Kansas City in both directions (R. 490). These rates have since been increased under the Commission's authorization in *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41 and 746, as follows: From Omaha and from Kansas City to Chicago to 16 cents; from Omaha to St. Louis to 14 cents; between Omaha and Kansas City to 6.5 cents. The rates shown in appellants' brief are these increased rates.

The rates quoted on page 21 of appellants' brief from Holdredge, Nebr., to Chicago, are clearly erroneous. It is there stated that Kansas City, in order to transit grain from Holdredge and ship it to Chicago, is required to pay a rate of 40 cents. The prescribed rate from Holdrege to Kansas City is 18.5 cents (R. 511), which, added to the prescribed proportional rate of 15 cents from Kansas City to Chicago (R. 490), makes a total of 33.5 cents. The prescribed rate of 18.5 cents from Holdrege to Kansas City has since been increased 5 percent to 19 cents, and the Kansas City-Chicago 15-cent rate has since been increased to 16 cents, making the present combination 35 cents, instead of 40 cents as shown in the appellants' brief.

In respect to appellants' fourth situation, relating to rates from San Antonio to St. Louis: The Commission did not prescribe rates from San Antonio or other points in Texas south of Fort Worth. Its orders require that the rate-break combinations on Kansas City shall be the exclusive basis of charge overall routes to St. Louis from points on and west of the line of the Santa Fe between Arkansas City, Kans., and Fort Worth, Tex. (205 I. C. C. 330; R. 307, affirming the finding in the original report at p. 663, R. 71). Kansas City does not complain of the advantage accruing to it from this adjustment. If the bases of rates applicable from other points not covered by the Commission's order are deemed by Kansas City to be violative of the Interstate Commerce Act, its proper recourse is by complaint to the Commission. Cf. *United States* v. *Merchants Assn.*, 242 U. S. 178, 188.

As to the fifth situation, relating to rates from Centerville, Chariton, and Indianola, Iowa, to St. Louis: All of these Iowa points are served by the Chicago, Burlington & Quincy as well as the Chicago, Rock Island & Pacific. The line of the Burlington runs directly to St. Louis via Keokuk, Iowa. The competitive line of the Rock Island from these Iowa points to St. Louis is via Kansas City. In 205 I. C. C. 301, 496 (R. 503), the Commission prescribed rates of 16.5 cents from Centerville, 19 cents

from Chariton, and 19.5 cents from Indianola, to St. Louis. Under the subsequent increases these rates became 17 cents, 20 cents, and 20 cents, respectively. From these points to Kansas City the Commission prescribed rates of 15 cents from Centerville, 15 cents from Chariton, and 16.5 cents from Indianola (205 I. C. C., 496; R. 504), which, as subsequently increased, became 16 cents, 16 cents, and 17 cents, respectively. From Kansas City to St. Louis the prescribed proportional rate was 11 cents. As subsequently increased, this rate became 12 cents.

This situation appears to be the same in principle as that presented to the Commission by the Kansas City Board of Trade in its complaint in Docket No. 28499, against the Chicago, Rock Island & Pacific Railway, which has been heard and is now pending before the Commission for decision. A certified copy of the complaint in that docket, together with a few pages of the testimony, was introduced below as defendants' Exhibit No. 16 (R. 719–720) and is here as an original exhibit. What the Commission's decision will be cannot, of course, be known in advance.

SUMMARY OF ARGUMENT

Appellants concede that the Commission's orders were made after hearings, do not contend that there was lack of a full hearing, or that there was any irregularity in the proceedings. Issued under the provisions of the Interstate Commerce Act, upon findings of violations of that Act, the orders were within the Commission's authority, and there is no contention to the contrary. Nor do appellants allege that the numerous findings of fact in the Commission's reports were made without evidence. Being thus unchallenged, these findings of fact may be accepted as fully supported by substantial evidence. Notwithstanding the Commission's finding to the contrary, thus conceded to be supported by substantial evidence, appellants contend that the rates and practices in question are unreasonable and unduly discriminatory or prejudicial, in violation of sections 1, 2, and 3 of the Act. Their principal argument seeks

to support this contention. But, obviously, to sustain the contention, the Court must review and weigh the evidence and make independent findings upon these questions, which are clearly administrative in character. It is established by numerous decisions of this Court, so thoroughly as to leave little room for doubt, that such questions are questions of fact, for determination by the administrative tribunal, and not questions of law for the Court either as an original matter or upon review. Appellants' principal argument, therefore, which assumes erroneously that this Court will perform the administrative function of determining whether the rates and practices complained of are unreasonable or unduly discriminatory, must be rejected.

Appellants argue that there was an obvious discrimination, that there was no room for the exercise of administrative judgment, that therefore the Commission erred as a matter of law in finding negatively that there was no undue discrimination or prejudice in violation of the Act. The argument is unsound because it assumes its factual basis, because it disregards numerous relevant facts and circumstances found by the Commission which formed the basis of its conclusion and decision both in the *Grain* cases proper and in the subsequent formal complaint proceedings, and because it assumes that if the respective transportation and transit services and the costs thereof are the same, the conclusion must follow, regardless of all other relevant circumstances and conditions, that unlawful discrimination exists.

Under sections 2 and 3 an alleged preference is not "undue" or "unreasonable" except in instances where the circumstances and conditions are substantially similar. The Commission's conclusion that there is no unjust discrimination and no unreasonable or undue preference or prejudice is based, among other things, upon a finding of substantial differences in conditions affecting the transit at interior points and at the primary rate-break points, the Commission having found that there is a difference in the rate bases applying when transit

is taken at the respective points, that there is a difference in the form of transit, and that there is a difference in advantages resulting from the different rate bases and different forms of transit.

Appellants, conceding that the Commission found many differences, argue that such differences are insufficient in law, but this argument, when based on such a concession, seems but to ask the Court to consider the facts for the purpose of determining the question of fact, not of law, whether the alleged preference is unjust or undue and therefore unlawful. It is clear that such a determination calls for the exercise of an administrative rather than a judicial function.

While the Commission's order is subject to review, the range of issues open to review is narrow. "Only questions affecting constitutional power, statutory authority, and the basic prerequisite of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestible."—*Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 139.

Appellants, in relying upon an expression in an earlier report that was later modified, again ask the Court to reach an independent judgment upon a matter purely adminstrative.

In deciding the formal complaints the Commission properly gave consideration to the matters, among others, that to grant the transit sought (1) would reestablish the dual system of rates through the primary markets, found by the Commission to be objectionable and unlawful, (2) provide transit balances from the primary markets lower than the prescribed proportional rates, (3) destroy the prescribed relation of rates in the Western District. Appellants argue that these considerations are insufficient in law and in fact to support the order denying relief. These are not the only grounds upon which the order rests. They were, however, properly considered, inasmuch as they go to support the conclusions reached.

In finding, upon a review of all the relevant facts and circumstances shown of record, that the alleged discrimination or prejudice was not unjust or undue, the Commission con-

sidered only pertinent matters properly to be considered in rate regulation. The Commission properly considered the question whether to grant relief would reestablish the dual system of rates from the primary markets, disturb and disrupt the rate-break structure, and reduce the revenues of the carriers. These are all transportation conditions. Having found that the rate-break system would serve the best interests not only of the primary markets but of the producers, consumers, and carriers, and having carefully worked out a reasonable and nonprejudicial rate structure based upon this principle, with carefully graded inbound rates and sensitively related proportional rates from each of the primary markets, so as to accord to all concerned not only reasonable rates but properly related rates, it was within the Commission's power to prevent the reestablishment of the unlawful dual system which would disturb and disrupt this structure and reduce the revenues of the carriers. *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476; *I. C. C. v. C., R. I. & P. Ry. Co.*, 218 U. S. 88, 103; *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585.

The orders in question do not neutralize or offset natural advantages of the primary markets. Appellants' claim that the benefits flowing to the primary markets from the rate-break system are due to natural advantages of location is untenable, since it overlooks that the rate-break is merely a form of rates and that whether the rates shall be in this form or some other such as overhead through rates is within the administrative discretion of the Commission. Here, the Commission ordered the rate-break system, finding it warranted by the record in the interest of market, carrier, and producer, but warned that if it should fail, a system of overhead rates through the markets would be a possible alternative. In any event no natural advantages entitle these markets to both rate-break combinations and overhead through rates with transit balances lower than the out-bound components of the rate-break combinations—the proportional

rates—to the same destinations. The primary markets are not entitled as a matter of law to such a dual system of rates. The Commission condemned that system as unduly prejudicial and otherwise unlawful, prescribed the rate-break system to take its place, revised the in-bound local rates and outbound proportionals to a reduced basis in consideration of the elimination of the lower transit balances, and fixed the proportional rates at the approximate average of transit balances that would have resulted had reasonable overhead through rates been prescribed instead of rate-break combinations. There are no natural advantages that entitle the primary markets to these proportional rates, determined and fixed in this manner, and also to certain lower transit balances.

The legal effect of the challenged orders is the same as if supported by all members of the Commission.

The Commission's orders, granting to the primary markets all the advantages of transit under the rate-break system, do not subject them to legal damage by denying to them the further advantage of additional transit under competitive overhead rates.

The relief sought—annulment of only part of the general adjustment prescribed by the Commission—should be denied because to grant it would require the exercise of the administrative function of *revising* the adjustment. The prayer of the bill is in the alternative and asks that the Court enjoin the Commission's orders insofar as they require or permit a basis of transit at the primary markets different from that at interior points. The prayer, if granted, could be complied with (1) by withdrawing the transit from the interior points; (2) by extending it to the primary markets. It seems clear appellants would not want the first alternative adopted. Moreover, it appears that it could not be adopted lawfully, since the Commission found that the withdrawal of this transit from the interior points on indirect routes would result in undue prejudice against such points and undue preference of

other interior points on direct routes. What appellants seek in this suit is the extension of the transit to the primary markets. In substance, they ask the Court to compel the Commission to issue a mandatory order to the carriers requiring that they grant such transit at the primary markets. The result would be that the primary markets would obtain highly important transit balances which would carry a huge volume of grain, at levels substantially lower than the reduced reasonable proportional rates prescribed by the Commission. The bill does not ask that the prescribed proportional rates be enjoined. Appellants wish to retain these proportional rates and in addition secure the reestablishment of lower transit balances. But it is obvious from the Commission's reports that the reduced in-bound rates and the reduced out-bound proportional rates would not have been prescribed without the requirement that the transit balances be eliminated. Thus, clearly, the appellants, in not attacking the prescribed rate structure as a whole but in seeking to eliminate an integral part of it, in effect ask the Court to revise the prescribed adjustment. The order is not segregable in this respect. This Court has repeatedly held that it will not revise a rate adjustment ordered by an administrative body acting within the scope of its authority. *Northern Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 599; *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 51. The relief sought should be denied on the ground that to grant it would require the Court to perform administrative functions.

ARGUMENT

I

Appellants' principal argument assumes, erroneously, that this court will perform the administrative function of determining whether the rates and practices complained of are unreasonable or unjustly discriminatory

Appellants' bill concedes that the Commission's orders were made after hearings, contains no charge that there was lack of

a full hearing, or that there was any irregularity in the proceedings. Issued under the authority of section 15 (1) of the Interstate Commerce Act, upon findings of unreasonableness in violation of section 1 and undue preference and prejudice in violation of section 3, the orders are of such a nature as the Commission is clearly authorized to make, and there is no contention to the contrary. Nor do appellants allege in their bill or elsewhere that the numerous findings of fact expressed in the several reports of the Commission were made without evidence. Being this unchallenged, these findings of fact may be accepted as fully supported by substantial evidence.[16]

Notwithstanding the Commission's findings to the contrary, thus conceded to be supported by substantial evidence, appellants contend that the rates and practices in question are unreasonable, unjustly discriminatory, and unduly prejudicial, in violation of sections 1, 2, and 3 of the Interstate Commerce Act. (See appellants' statement of points, R. 768, and specification of errors, brief, p. 26.)

While appellants' brief raises several questions of law within the scope of judicial review of administrative orders, its principal argument is based upon the above contention and assumes, erroneously, that the Court will review and weigh the evidence and find independently that the rates and practices complained of are unreasonable and unjustly discriminatory.

It is so thoroughly established that such questions are questions, not of law, but administrative questions of fact for determination by the administrative body, that citation of authority is hardly necessary. "The finding of unreasonable-

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[16] "It is settled that any finding of fact by the Commission if supported by evidence is final and conclusive on the courts." *Keller* v. *Potomac Elec. Power Co.*, 261 U. S. 428, 442, citing *I. C. C.* v. *Union Pac. R. Co.*, 222 U. S. 541, 547. The validity of the orders is to be tested, therefore, upon the facts appearing upon the face of the Commission's reports.

While certified copy of the evidence in the formal complaint cases is before this Court as an original exhibit, it is unnecessary under the circumstances to resort to it to ascertain the facts. The evidence in the *Grain* cases proper (filling about 149 volumes), is not here.

ness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454."—*Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665–666.

"This section [3] forbids any undue or unreasonable preference or advantage in favor of any person * * * or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144, 170."—*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361.

"It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 * * * renders unlawful any '*undue or unreasonable*' preference or advantage, prejudice, or disadvantage. * * * And in the first paragraph of amended Section 15 * * * it is rates, regulations, or practices that in the opinion of the Commission are '*unjustly* discriminatory, or *unduly* preferential or prejudicial,' etc., to which the prohibition is to be applied. Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."—*Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481.

"Every rate which gives preference or advantage to certain persons, commodities, localities, or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by sections 2 and 3) only that discrimination which is

unreasonable, undue, or unjust. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219, 220; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481. Whether a preference or discrimination is undue, unreasonable, or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case."—*Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 322.

"* * * And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."—*United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320–321.

Adherence to the principle, without modification, is disclosed by the decision in *United States* v. *Trucking Co.*, 310 U. S. 344, 352–353:

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." And where a court substituted "its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so [the court], obviously exerted an authority not conferred upon it by the stat-

> ute." [Citing *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320.] * * * The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination. [Citing *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304; *Interstate Commerce Commission* v. *D., L. & W. R. Co.*, 220 U. S. 235, 255; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Texas & Pacific Ry. Co.* v. *I. C. C.*, 162 U. S. 197.]

Cf. *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, 291; *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29, 33–34; *I. C. C.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 470; *Los Angeles Switching Case*, 234 U. S. 294, 314; *I. C. C.* v. *L. & N. R. R. Co.* 227 U. S. 88, 100; *Seaboard Air Line Ry.* v. *United States*, 254 U. S. 57; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121, 131; *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428, 444; *Radio Comm.* v. *General Elec. Co.*, 281 U. S. 464, 469.

The cases relied upon by appellants in support of their contention that this Court will determine independently whether the rates and practices here involved are unreasonable or unduly discriminatory, *Mitchell* v. *United States*, 313 U. S. 80; *I. C. C.* v. *Union Pac. R. R.*, 222 U. S. 541; *Sou. Pac. Co.* v. *I. C. C.*, 219 U. S. 433; *Ann Arbor R. Co.* v. *United States*, 281 U. S. 638; *Tex. & Pac. R. R. Co.* v. *United States*, 289 U. S. 627; *Alton R. Co.* v. *U. S.*, 287 U. S. 229, are inapposite, for they all turned on questions of law. In none of those cases was the Court called upon, as here, to perform the purely administrative function of determining independently the question

whether certain rates were unreasonable or unjustly discriminatory. Here appellants ask the Court to disregard many elements which the Commission deemed relevant and, upon consideration of only a few facts alleged to be controlling, to reach an independent conclusion of fact contrary to that reached by the fact-finding body.

II

The Commission's conclusion that the grant of transit at the interior points and its denial at the primary markets under the particular competitive rates in question does not result in unjust discrimination or undue prejudice is based upon findings of substantial differences in the rate bases and rules and regulations governing transit, and other differences in relevant circumstances and conditions

Appellants' principal argument, in substance, is this: Under the proportional rates prescribed by the orders for application from the primary markets, transit is permitted at all intermediate points on the route except a primary market. Denial of the transit at the intermediate primary market results in a higher rate than that applicable when transit is taken at an intermediate interior point. The transportation and transit service and the cost thereof is the same whether transit is taken at an intermediate interior point or at an intermediate primary market. There is, therefore, an obvious discrimination, in violation of sections 2 and 3 of the Interstate Commerce Act, and there is no room for the exercise of administrative judgment. The Commission therefore erred as a matter of law in finding that this inequality was not unjustly discriminatory and unduly prejudicial in violation of sections 2 and 3 of the Act.

The argument is unsound, we submit, because it assumes its factual basis, since there was no finding by the Commission that the transportation and transit service and the cost thereof is the same at the respective points; because it disre-

gards numerous relevant facts and circumstances found by the Commission which formed the basis of its conclusion and decision both in the *Grain* cases proper and in the subsequent formal complaint proceedings; and because it assumes that if the respective transportation and transit services and the costs thereof are the same, the conclusion must follow, regardless of all other relevant circumstances and conditions, that unlawful discrimination exists.

Under the provisions of section 2 an alleged inequality in transportation services performed for different persons is not unlawful unless the circumstances and conditions affecting the respective services are substantially similar. Under section 3 an alleged prejudice and preference, to come within the prohibition, must be "undue" or "unreasonable." While section 3 does not contain the words of section 2 "under substantially similar circumstances and conditions," it is the settled interpretation of section 3 that an alleged preference cannot be found to be *undue* unless the respective circumstances and conditions are substantially similar.[17]

The Commission's conclusion and decision that there is no unjust discrimination and no unreasonable or undue preference or prejudice in the situation here complained of is based, among other things, upon a finding of substantial differences in conditions affecting the interior transit points and the primary rate-

[17] This is clearly expressed by Commissioner Clements in *Board of Trade of Carrollton, Ga., v. C. of G. Ry. Co.*, 28 I. C. C. 154, 167–168: "* * * the third section of the Act forbids the giving of undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality; and while this section does not carry the phrase employed in section 2, 'under substantially similar circumstances and conditions,' * * * nevertheless, it contains words of wider scope, 'in any respect whatsoever;' and, as a matter of practical application, the thought, if not the words, 'under substantially similar circumstances and conditions,' must be present to the mind in considering under section 3 what preferences or advantages are due or reasonable, or are undue or unreasonable." In *Clover Splint Coal Co. v. Louisville & N. R. Co.*, 197 I. C. C. 276 (1933), the Commission, after quoting from the earlier case, held that "It is now well settled that sufficient dissimilarity of circumstances and conditions will prevent what would otherwise be a violation of the statute."

break points (R. 538–541). The Commission found (1) that there is a difference in the rate bases applying when transit is taken at the respective points; (2) that there is a difference in the form of transit; (3) that there is a difference in advantages resulting from the different rate bases and different forms of transit.

1. Difference in rate bases

While, for the purpose of according to shippers a lower basis of rates under transit than would otherwise apply, the in-bound and out-bound movements are viewed as continuous through movements, this is only a fiction, and as a matter of fact, they are separate and distinct shipments. This is true in respect of shipments to and from both primary markets and interior points. There is nothing that requires like bases of rates upon the separate out-bound shipments from these respective transit points. It is a fact that the basis of rates upon the out-bound shipments from the primary markets is different from that applying upon the out-bound shipments from the interior points.

Under the transit practice the operator draws in his grain from various points of origin, paying for this transportation service the lawfully published tariff rates from the respective points of origin to the transit point. In this respect the practice is the same at the primary markets and at the interior points. Then, if the transit rules and regulations are complied with, the operator at either point may obtain a reduced basis of rate upon the out-bound shipments. Under the rate-break system, the reduced rate basis is in the form of the out-bound proportional rate. But the rate-break system applies only at the primary markets; in no instance does it apply at an interior point. These interior points are not rate-break points. The rates applying to and from or through these points are in no instance a combination of local rates in and proportional rates out. Those points transit, if at all, under overhead through rates. Therefore, they pay, upon their out-bound shipments, the *transit balance*, whatever it may be. Since this transit

balance is the difference between the in-bound rate and the overhead through rate, it varies, because the in-bound rates from various points of origin to the transit point vary, and the overhead through rates vary. In no instance are the transit balances from the interior points averaged and fixed as a constant factor. In some instances, therefore, operators at interior points will obtain a low transit balance, and in other instances they will pay a high transit balance. At the primary markets, transit on overhead through rates is forbidden. Transit may be taken there only at the out-bound proportional rates, which are fixed and constant, representing in each instance the approximate average of transit balances under reasonable overhead through rates determined (but not prescribed) by the Commission, the Commission having required this basis in order to remove the objectionable and unlawful features of the dual system of rates previously existing.

While, therefore, the out-bound basis of charge upon grain transited at the primary markets is a fixed, constant, *averaged* factor in the form of a proportional rate, the out-bound basis of charge upon traffic transited at the interior points is fundamentally different, being the transit balance, which will vary depending upon the point of origin, the in-bound rate therefrom to the transit point, and the overhead through rate.

2. Difference in form of transit

In the supplemental report on rehearing (215 I. C. C. 83; R. 526–584), modifying previous findings so as to authorize transit at an intermediate interior point on a route through a rate-break market, the Commission pointed out the differences between transit under overhead-through rates—the only form of transit available to the interior points—and transit under the rate-break combinations available at the primary markets (R. 538–540). It there found that transit under an overhead or one-factor through rate "permits of the drawing of grain into the transit point, and of the later out-bound shipment of an equivalent tonnage of that kind of grain or

its products, on the basis of the 1-factor through rate from the origin of the grain to the final transit destination. The local rate on the in-bound shipment to the transit point is first paid, and the freight bill covering that shipment is recorded with the transit bureau, as evidence of intention of further transportation of the in-bound grain (or its equivalent in tonnage) or its products. When the out-bound shipment is tendered the in-bound freight bill is surrendered as authority for the charging on the out-bound shipment (in lieu of the local rate from the transit point that would otherwise apply) of the difference between the in-bound local rate and the 1-factor through rate (the transit balance) from the origin of the grain to the final destination" (R. 538).

"The foregoing," the Commission explained "are the mechanics of transit also under the rate-break combination, except that the out-bound shipment under that combination is on a definitely published constant factor, instead of on the unpublished and varying difference between the 1-factor rates to the transit point and to final destination" (R. 538).

"But there is a *substantial difference* in the effects of the transit operation under the two bases of through charge, due to the inherent difference in the character of the 1-factor through rates with transit and the rate-break combinations (R. 538). [Italics ours.]

"Transit under 1-factor through rates is usually confined to points situated on reasonably direct routes, because the publication of 1-factor through rates is ordinarily so confined. In the absence of carrier competition the basis of charge for shipments over markedly circuitous routes is frequently the rate over the direct route plus an out-of-line charge, or is the combination of locals. Also the out-bound shipment from the transit point is usually held to the rails of the in-bound carrier, when the 1-factor through rate is over one line, and to the rails of the carrier participating with the in-bound carrier in a joint rate via the transit point, when the transportation is over more than one line. Thus transit places a decided limitation

upon the freedom of interchange of shipments between carriers out of a transit point well served by carrier facilities (R. 538–539).

"The through rates resulting from the rate-break combinations are affected by no such restrictions, either as to circuity of routes or choice of out-bound carrier, because the proportional rate becomes applicable upon the surrender of a freight bill covering the required amount of in-bound tonnage from any origin, and because the proportional rates are applicable over all lines from the markets to all destinations to which published. Through rates less than the combinations of locals on the rate-break markets are therefore available to transit operators at those markets on all shipments to all destinations to which the proportional rates are published, from all origins, and over all routes through those markets, no matter how circuitous. That this is of substantial advantage to the transit operators at the rate-break markets over the transit operators at the interior transit points is well illustrated in *Southwestern Millers' League* v. *Atchison, T. & S. F. Ry. Co.*, 24 I. C. C. 552, 554–555 (R. 539).

"Commercially, the proportional rate, when applied on the bulk of the traffic out of the market, is of especial benefit to the price-registering markets, such as Chicago, Minneapolis, and Kansas City, as a price stabilizer, because the known equality of out-bound charges enables grain dealers there to compete on an equality in the purchase of grain at country origins. The importance of the proportional rate in this respect is diminished when the lower transit balances become so numerous as to be applied on a substantial volume of the out-bound movement, and the uncertainty as to the out-bound charge among competing dealers is correspondingly increased. One-factor through rates with transit would exercise no such stabilizing influence on prices unless one transit balance become so universally used as to be recognized as the so-called 'going balance,' paid by all dealers on the bulk of their shipments, and on which their country grain purchases

were generally based. Under 1-factor through rates with transit and varying transit balances, and with frequent crop shortages in accustomed sources of supply, and other untoward conditions, the availability of such a constant balance is usually not assured. Under the exclusive application of the rate-break combinations the proportional rate as the one out-bound basis of charge from the rate-break market is always assured, together with an adequate supply of in-bound billing at all times for surrender in connection with the out-bound shipment under that rate (R. 539–540).

"Transit and the rate-break combinations are two essentially different bases of rates, and one should not be permitted to interfere with the other. Transit at the interior transit points does not interfere with the rate-break combinations, but the rate-break combinations do interfere with transit at the interior transit points, because of the incidental passing of the shipment through a rate-break market on the route sought to be equalized with a cheaper route. This is the situation, despite the fact that the construction of the through charge over that route on the basis of the rate-break combination, in lieu of the 1-factor through rate with transit (under which latter basis transit would usually be given at both the rate-break market and the interior transit point in order to equalize with a cheaper route), is neither at the request of, nor of primary interest to, the interior transit points. [R. 540.]

"While it is true that under the rate-break combinations the transit operator located between the country origins of the grain and the first rate-break market has the same choice of out-bound carrier from the market as the transit operator at the market, the volume of grain available to him for transportation under the flat rates into the market, under the restricted routing requirements of transit, is not comparable with the volume of grain available to the rate-break market, under the unrestricted routing permitted by the rate-break combinations. The situation is substantially the same as to the volume of country grain available to the transit operator located be-

yond the first rate-break market. Millers located there usually purchase their grain largely at the first market which is in position to furnish the desired kind of grain, by reason of the general concentration, mixing, and grading of grains incident to the operation of the rate-break market, the direct benefits of which accrue to the grain dealers at the market." (R. 540.)

3. Difference in advantages

In its report of October 22, 1934, the Commission found that the very fact of the existence of the proportional rates given the primary markets *a decided advantage* over the interior transit points, from which no proportional rates apply. This finding appears in the report under the heading "Proportional Rate Advantages" (R. 319–320):

"In connection with the requests for exceptions to the rule for the exclusive application of the rate-break combinations, consideration should be given to an important advantage of the rate-break combination over the one-factor through rate with transit. The proportional rate is applicable over all out-bound lines upon surrender of an in-bound freight bill covering an in-bound shipment by rail, whether the transportation through the rate-break market is over a reasonably direct route or not. It is the equivalent in all respects, and more, of a local rate. In substance it is a special local rate from the rate-break market, with no intermediate application as maximum, and with no requirement of fourth-section relief for the failure of that application, because of the fiction of its status as a part of a through rate. It is designed for the final gathering in by the rate-break market, for through transportation at less than the combinations of local rates that would otherwise apply, of grain not procurable under one-factor through rates less than the rate-break combinations (and resulting transit balances less than the proportional), because of the limitations on out-of-line and back-haul movement incident to the usual application of the one-factor through rates only over reasonably direct routes, and because of the further usual requirement of out-bound

shipment from the transit point over the rails of the in-bound carrier.

"The proportional rates therefore open up to the rate-break markets the widest possible range of originating and distributing territory and afford, together with the larger number of carriers usually found converging in-bound to and radiating out-bound from the rate-break market, in the direction of the normal flow of grain traffic, a decided advantage to that market over the interior transit point."

Thus, the Commission found substantial differences, and in view of these and other important differences in the circumstances and conditions surrounding transit at the primary markets and transit at the interior points, and the resulting differences in the *bases of rates* as applied upon the entire traffic through the respective points, found that there was no unjust or undue discrimination.

It found that "the rate-break markets and interior transit points on all routes are merely accorded the benefit of their respective forms of transit, each without interference from the other"; that "the present adjustment of rates on grain and grain products throughout the Western District does not subject the rate-break markets on indirect routes to undue prejudice and disadvantage and give to points on the same or other routes an undue preference and advantage * * *." (229 I. C. C. 9; R. 644.)

Appellants' brief concedes that the Commission found many differences, but argues that such differences "are insufficient as a matter of law to constitute a lawful basis or justification" for the orders. This argument, when based on such a concession, seems but to ask the Court to consider the facts for the purpose of determining, not a question of law, but the question of fact whether the alleged preference is unjust or undue and therefore unlawful. But it is clear that such a determination calls for the exercise of an administrative, not a judicial, function. The Commission's order is, of course, subject to review but "the range of issues open to review is

narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm.* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm.* v. *Union Pacific R. Co.*, 222 U. S. 541."—*Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 139–140.

(a) The statement in the first supplemental report, 173 I. C. C., that restriction was laid on the intermediate points in order not to discriminate against the market, must be deemed withdrawn in view of the subsequent modification

In ruling, in its report in 173 I. C. C., 515–516 (R. 239–241) that carriers whose lines formed a route passing through an intermediate rate-break market might apply over their route a rate-break combination on another market, in order to meet carrier competition, provided that transit was not taken either at the intermediate market or any other point on the route passing through the intermediate market, the Commission said the restriction "is laid on the intermediate points other than the market, as well as upon the market, in order not to discriminate against the market in favor of the other intermediate points." As we have seen, this was modified in subsequent reports so as to permit transit at intermediate interior points on indirect routes, upon findings that otherwise there would be undue prejudice against such points in favor of interior points on direct routes and that there would be no undue prejudice against the intermediate primary markets.

In its report in 223 I. C. C. 235, at p. 245 (R. 625–626), the Commission said:

> No extensive rate structure can be made perfect nor can any rate structure be made permanent in any real sense in a changing world. To meet demonstrated difficulties and to overcome prejudicial features which early experience under the new rates had developed in several localities, we have heretofore modified the rates originally prescribed in the second *Grain case* in a number

of particulars. For example, in *Wheat Products from Twin Cities to Chicago, supra,* we authorized transit at Minneapolis on wheat drawn from or through Duluth. In the second report in the *Grain case,* 215 I. C. C. 83, at page 95 [R. 543–545], we ordered canceled proportional rates between Chicago, Peoria, and St. Louis, because the rate-break combinations were unduly burdensome to industries at such points and were therefore unworkable. In the same report, pages 88 to 93, inclusive, we modified our previous finding as to transit at interior points such as Rush City and Hastings, Minn., on routes through rate-break markets, in order to aid such points to operate in competition with points on lower-rated routes. This was a modification of our previous finding in the first *Grain case,* 173 I. C. C. 511, page 516, on the same subject. We there said that the restriction under which interior transit points on routes through rate-break markets were held to the same basis of rates as the markets on the same routes was laid on the intermediate points as well as upon the markets, in order not to discriminate against the markets in favor of the intermediate points, and that the fact that the markets may draw grain from a wider territory than the intermediate points hardly afforded justification for a difference in treatment. Complainants say that this is a correct statement of fact and of law, and that, conversely, our modification thereof is erroneous in both these respects. A return to our first view would, however, be a hardship upon the milling industry at many intermediate points, with little or no benefit to the markets, which would still be at a disadvantage in competing with other rate-break markets and interior points on lower-rated routes.

Notwithstanding the subsequent modification and the express holding of the absence of unlawful discrimination in these circumstances, appellants in their brief reiterate time and again

the statement in the earlier report that the restriction was laid against the interior points as well as the rate-break points in order not to discriminate against the latter. But, in view of the subsequent reports, it must be deemed that the expression in the earlier report was withdrawn. In *New England Divisions Case*, 261 U. S. 184, 203, the Supreme Court, speaking of a similar contention, said:

> The contention * * * rests largely * * * upon expression in the first report of the Commission, which, in view of the second report and order thereon, must be deemed to have been withdrawn.

Hence, there is no finding by the Commission of unjust discrimination against the primary markets. The earlier expression was withdrawn in the subsequent report; and when the Commission ruled upon the specific question as put in issue in the formal complaints of the primary markets, it expressly found "that the present adjustment of rates on grain and grain products throughout the western district does not subject the rate-break markets on indirect routes to undue prejudice and disadvantage and give to points on the same or other routes an undue preference and advantage * * *." (229 I. C. C. 9, 16; R. 644.) In view of these indisputable facts, appellants cannot by numerous repetitions reinstate the earlier expression. The repetition would seem to invite the Court to conclude that the earlier statement was right. But, as stated in *Mfgrs. Ry. Co.* v. *United States*, 246 U. S. 457, 482, after pointing out that it might be conceded that the evidence before the Commission in that case would have warranted a different finding:

> * * * indeed, the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done. *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, 320; *Penna. Co.* v. *U. S.*, 236 U. S. 351, 361.

And, as in *Los Angeles Switching Case*, 234 U. S. 294, 314:

> The argument for the petitioners necessarily invites the Court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the Court.

III

In deciding the formal complaints the Commission properly gave consideration to the facts, among others, that to grant the transit sought (1) would reestablish the dual system of rates through the primary markets; (2) provide transit balances from the primary markets lower than the prescribed proportional rates; (3) destroy the prescribed relation of rates in the Western District

In their brief, section III, pages 83, 85, appellants argue that these considerations are insufficient in law and in fact to support the order denying relief. These are not the only grounds upon which the order rests. We submit, however, that they were properly considered, inasmuch as they go to support the conclusions reached. These conclusions were expressed in the last report, 231 I. C. C. 793, 795 (R. 650–651):

> * * * to grant the requests for transit under proportional rates from the rate-break markets would be to reestablish the so-called dual system of rates. That system has been condemned in these proceedings upon five previous occasions. It would give the rate-break markets, Kansas City and Omaha, the privilege of using a 9.5-cent transit balance to defeat the present 16-cent proportional rate to Chicago, as well as to destroy the present relation required in rates from origins in the western district.[18]

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[18] At the time that report was written, March 13, 1939, the general increases authorized by the Commission in *Fifteen Percent Case, 1937–1938*, 226 I. C. C. 41, 746, had become effective, and the proportional rate of 15 cents from Omaha and Kansas City to Chicago had become 16 cents. The proportional

1. *It would reestablish the dual system of rates at the primary markets.* As previously shown, the Commission prescribed a proportional rate of 15 cents from both Omaha and Kansas City (also from Sioux City) to Chicago. The rate previously applicable from these points to Chicago was 17.5 cents.

The proportional rate of 15 cents was prescribed as the outbound component of the rate-break combinations on Missouri River markets from Kansas, Nebraska, and other western States to Chicago. These rate-break combinations were arrived at, the Commission explained (205 I. C. C., p. 328; R. 305), by first determining reasonable through rates from the origin key points to Chicago over the direct routes through the Missouri River markets, and then dividing them or "breaking them back" into in-bound local rates to the latter markets and proportional rates beyond on the basis of average relative mileages. This resulted in a proportional rate from the Missouri River markets to Chicago "approximating the average transit balances that would have resulted if one-factor through rates with transit, in lieu of the rate-break combination, had been prescribed."

These proportional rates were prescribed as the exclusive basis of charge. Overhead through rates via the markets with resulting transit balances from the markets were required to be canceled, to the end that there would be no transit balances that could be used to defeat the reduced proportional rates. *But to permit carrier competition*, certain overhead through rates, including proportional rates from one market to another through an intervening third market, were permitted to be applied via particular routes which pass through such intermediate markets, provided the shipments *merely pass through*. The shipments were not permitted to be stopped there for transit and reshipped at a transit bal-

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rate between Omaha and Kansas City had become 6.5 cents, so that if transit under the 16-cent rate from Omaha to Chicago were permitted at Kansas City, the transit balance would be 9.5 cents.

ance, for that would defeat the prescribed proportional rates. If they were not stopped for transit, there would be no defeat of the proportional rate from the intermediate market, and the situation would be the same as if the shipment moved either over a route far removed from the intermediate market or over a route that happened to skirt the market without actually passing through it.

Appellants insisted before the Commission that wherever a rate is applied via an intermediate market, even though it is permitted to be applied over a route passing through such market only in order to meet carrier competition, the intermediate market should be allowed to transit on such rate, but it is indisputable that wherever this is done, it results in transit balances lower than the proportional rate from the intermediate market. In the case of Kansas City it would result in a transit balance of 9 cents to Chicago if Kansas City were permitted to transit on the prescribed proportional rate of 15 cents from Omaha to Chicago, since the in-bound rate to Kansas City would be 6 cents. In the case of Omaha it would likewise result in a transit balance of 9 cents to Chicago if Omaha transited on the 15-cent proportional rate from Kansas City to Chicago, since the rate from Kansas City to Omaha is also 6 cents. In all such instances there would be a transit balance lower than the prescribed proportional rate. As found in the report of July 12, 1938, 229 I. C. C. 9, 15 (R. 643):

> The additional transits definitely listed in the petitions for an affirmative order would, if permitted, cover the main body of rates on grain and grain products through the several rate-break markets, as already stated. They would make applicable a great number of transit balances lower than the proportional rates out of the rate-break markets on indirect routes and would lead to a progressive increase in the number of such balances, in response to requests for the application of the

same principle in other instances, which could not consistently be denied., Another short step would be the establishment of one-factor rates less than the rate-break combinations over direct routes.

The appellants say that the Commission could control the situation, that it has full power to prevent the reestablishment of the dual system, that it could permit certain exceptions, as it has in other instances (Br. p. 91). Its findings and conclusions as expressed in the language just quoted is the answer to this suggestion. And it seems too plain for argument that if the Commission's hands were tied by the injunction sought by appellants it could not control the situation. It could, conceivably, supplant the rate-break system by a system of overhead through rates exclusively, but the appellants do not desire such a system of rates to be established. They want the rate-break with its proportionals. They also want overhead through rates with lower transit balances which can be used for transportation to the same destinations to which the proportional rates apply. In short, they want the dual system. If, however, that system is unlawful, as the Commission found, it is difficult to see how they could secure it. Appellants' case here in effect asks this Court to require the Commission to reestablish the dual system. It seems their suit must fail for this reason.

2. *It would give the rate-break markets the privilege of using a low transit balance to defeat the present proportional rates.* This is logically part of the first reason as discussed above. But in and of itself, even though it did not have the effect of reestablishing the dual system, it would be an adequate reason because it would result in transportation at rates far below those found by the Commission to be reasonable, and because properly related one to another, free from undue prejudice.

3. *It would destroy the present relation required in rates from origins in the Western District.* In the *Grain* case, the Commission, having decided that the rate-break combinations

should be the exclusive rate basis on traffic through the primary markets, proceeded to build the rate structure upon this foundation. As previously stated, it reduced and aligned the in-bound flat rates and the out-bound proportional rates so that all producing areas, carriers, markets, transit points, gateways, and destinations would have reasonable rates and reasonable rate relations, having due regard to distances and other transportation conditions.[19]

The prescribed proportional rates of 6 cents between Omaha and Kansas City and 3 cents between Omaha and Sioux City are important parts of the balanced adjustment worked out by the Commission. These rates apply on traffic in both directions and are used as bases of rates on both north-bound and south-bound traffic, including the important wheat traffic from Nebraska, Kansas, and Oklahoma through Kansas City, Omaha, or Sioux City to Minneapolis, Duluth, and surrounding territory, as well as south-bound wheat and coarse grains from Minnesota, Iowa, South Dakota, and Nebraska through one or another of the Missouri River markets to Memphis as the gateway to the lower Mississippi Valley and the Southeast, and to Arkansas, Louisiana, and Texas. These key rates also fix the relation of the rates from southern South Dakota and surrounding territory through Sioux City, Omaha, and Kansas City to Chicago, St. Louis, and Memphis.

As illustrative of the importance of these rates it may be noted that the rates from all points in Kansas (except the

[19] The relation of rates to one another on a highly competitive commodity like grain is of equal if not greater importance than the inherent reasonableness of the rates considered individually. As stated in the Commission's first report, 164 I. C. C., at p. 697, R. 105: "In some respects, in a traffic sense, wheat is the most liquid commodity known in transportation. The classes or grades of wheat have long been standardized and, commercially, wheat approximates currency. The rate structure should permit it to move freely in all directions. Rates on wheat are closely related to one another, and even a slight change in one will ordinarily affect the movement governed by the others. In fact, generally speaking, all the rates on wheat may be likened to a huge blanket covering the entire country, and a pull on any part of this blanket to the extent of 1 or 2 cents, sometimes even a fraction of a cent, will be felt in every other part."

northeastern corner) to Omaha are made by adding to the local rate from Kansas origin to Kansas City the proportional rate of 6 cents from Kansas City to Omaha. From such Kansas points to Sioux City the through rate is composed of the local rate to Kansas City, plus the proportional rate of 6 cents from Kansas City to Omaha, plus the proportional rate of 3 cents from Omaha to Sioux City. Thus, from Dodge City, Kans., the local rate to Kansas City is 20 cents, to Omaha 26 cents, to Sioux City 29 cents. To equalize the rates from Kansas, Oklahoma, and surrounding territory to Minneapolis through these three markets, the proportional rate from Sioux City is made 3 cents less than from Omaha, and the rate from Omaha 6 cents less than from Kansas City—the prescribed proportional rates to Minneapolis being 8.5 cents from Sioux City, 11.5 cents from Omaha, and 17.5 cents from Kansas City. In each instance, therefore, the applicable rates through these three markets to Minneapolis is the same, 37.5 cents.

The rate from Omaha to Memphis (as a gateway to the lower Mississippi Valley and the Southeast) is equal to the combination on Kansas City. To Memphis that combination would be the proportional rate of 6 cents from Omaha to Kansas City, and 18 cents from Kansas City to Memphis. By reference to the table of prescribed proportional rates in 205 I. C. C., at page 486 (R. 490–491), it will be noted that the proportional rate from Omaha to Memphis on traffic for the Mississippi Valley and for the Southeast is 24 cents, while the rate from Kansas City to Memphis on traffic for the Mississippi Valley and for the Southeast is 18 cents, the rate from Omaha being 6 cents higher than the rate from Kansas City.

While, as shown above, the rate from Kansas City to Minneapolis is higher than the rate from Omaha by the amount of the prescribed 6-cent proportional between Kansas City and Omaha, and Kansas City is at a 6-cent rate disadvantage compared with Omaha on that northbound traffic, it is at a corresponding advantage over Omaha of 6 cents on southbound traffic.

One of the most important wheat-producing regions in the Middle West is the South Platte region of Nebraska, defined in the report in 205 I. C. C. 383 (R. 370) as that portion of Nebraska south of the main line of the Union Pacific Railroad, which follows the Platte River westward from Omaha. The distances from this region to Omaha are substantially shorter than they are to Kansas City. In view of this fact, the Commission prescribed rates from stations there to Omaha 2 cents less than to Kansas City; e. g., from Holdrege to Omaha, 16.5 cents; to Kansas City, 18.5 cents. Since the proportional rate from Kansas City to Chicago is the same as from Omaha to Chicago, 15 cents, Kansas City is at a 2-cent disadvantage over Omaha on shipments to Chicago—a disadvantage due to the longer distances via Kansas City. But from the South Platte region to St. Louis the distances are about the same through Kansas City as through Omaha, and the through rates are accordingly equalized through those gateways. The prescribed proportional rate from Omaha to St. Louis, 13 cents, is 2 cents higher than the prescribed proportional rate of 11 cents from Kansas City. Thus, from Holdrege to St. Louis via Omaha the rate is 16.5, plus 13, or 29.5, and the rate via Kansas City is 18.5, plus 11, equalling the same total of 29.5.

These are only a few of the many situations dealt with in the reports. They are illustrative of the numerous rate relations worked out, in order to achieve a balanced adjustment that would be both reasonable and free from undue prejudice. As stated in *Wheat Products from Twin Cities to Chicago*, 218 I. C. C. 27, involving some of the rate adjustments effected in the present case, and speaking of the rate relations prescribed:

> The relation of the proportional rates and the requirement of their exclusive application on shipments out of the rate-break markets were prescribed as a reasonable general adjustment that would give to each competing market its due.

If Kansas City were permitted to transit on the Omaha-Chicago proportional rate of 15 cents, it would pay for the in-bound movement from Omaha to Kansas City the proportional rate of 6 cents, assuming that the proper freight bill showing an in-bound shipment to Omaha were surrendered to the time of the shipment from Omaha to Kansas City. Upon arrival at Kansas City the consignee would obtain a freight bill showing the payment of the 6-cent rate and proving the existence of an in-bound shipment to Kansas City. But the transit operator there would not be required to use this bill for any particular out-bound shipment. He could use it on any out-bound shipment whatsoever in order to secure the application of a proportional rate whether that rate applied to Chicago, Peoria, St. Louis, Memphis, or to a point in Arkansas, Louisiana, or Texas. There would be nothing to prevent the Kansas City operator from surrendering this bill to cover an out-bound shipment of wheat that had come, for example, from Dodge City, Kans. The lawful rate prescribed by the Commission from Dodge City, Kans., to Chicago, is 35 cents, composed of the Kansas City rate-break combination of 20 cents in and 15 cents out. If, by the use of the Omaha bill, the operator could secure a transit balance of 9 cents, he could obtain transportation from Dodge City to Chicago for a net rate of 29 cents—the in-bound rate of 20 cents to Kansas City plus the transit balance of 9 cents beyound, thus defeating the prescribed combination from Dodge City to Chicago by 6 cents. He could then surrender the bill covering the Dodge City grain on some other grain going, for example, to the South, and pay no more or less than the established tariff rates (Cf. 205 I. C. C. 301, 336–338; R. 314–316).[29]

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[29] In the regular course of business a carload of grain arriving at a primary market is unloaded into an elevator and its identity lost; and when an outbound shipment moves no one knows where the particular grain in that car originated. Indeed, it may be a mixture of grain from many different origins, or the milled product of grain, such as flour.

If Omaha were permitted to transit on the Kansas City-Chicago proportional rate of 15 cents, an operator there would pay for the in-bound movement from Kansas City to Omaha the proportional rate of 6 cents. He could use the freight bill covering that shipment in connection with a shipment of wheat from a point in Nebraska, say Holdrege, and obtain transportation to Chicago for a transit balance of 9 cents, resulting in a charge for the movement from Holdrege to Chicago of 25.5 cents, whereas the lawful charge prescribed by the Commission is 31.5 cents, composed of 16.5 cents to Omaha plus 15 cents beyond. The freight bill on the Holdrege shipment could be surrendered on some other shipment, say to Minneapolis, and it would pay the lawful rate—11.5 cents—and there would be no penalty to offset the advantage of 6 cents gained on the Chicago shipment.

If Kansas City were allowed to transit on the 15-cent rate from Omaha to Chicago, applied over routes through Kansas City in order to meet the competition of the direct routes from Omaha to Chicago, it would result that a shipment from Holdrege to Chicago over the indirect route through both Omaha and Kansas City would pay 2 cents *less* than a shipment moving over a direct route from Holdrege to Kansas City thence over a direct route to Chicago. There are direct routes from the South Platte region to Kansas City that do not pass through Omaha. If, instead of sending the grain over these direct routes to Kansas City, the shippers could get a rate 2 cents lower by sending it over the indirect routes first to Omaha then to

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Nevertheless, it would be a simple matter for a transit operator at a primary market, say Kansas City, to obtain transportation to Chicago at a transit balance of 9 cents, instead of the proportional rate of 15 cents, of wheat shipped to Kansas City from Kansas. It would not even be necessary for him to unload the car of Kansas wheat. He could immediately reship it to Chicago, without even unloading it from the car, and obtain the transportation at a 9-cent charge, by surrendering a freight bill covering a shipment from Omaha, whereas if the shipper in Kansas shipped that car directly through to Chicago, he could not escape the payment of the Kansas City rate-break combination of the flat rate in and the proportional rate of 15 cents out.

Kansas City, it is evident that little traffic would move over the direct route and the result would be that much of it would pay 2 cents less than the lawful rate prescribed by the Commission.

As previously shown, the rates on wheat from practically all points in Kansas to Omaha are made on basis of the Kansas City combination, i. e., the flat in-bound rate from the Kansas origin to Kansas City plus the proportional rate of 6 cents from Kansas City to Omaha. Thus, at present, when Omaha draws in Kansas wheat it must pay this combination; when it ships it to Chicago it must pay the lawfully prescribed proportional rate of 15 cents. If, however, Omaha could transit on the Kansas City-Chicago proportional rate of 15 cents applied over a route via Omaha in order to meet the competition of the more direct routes, Omaha could completely avoid the payment of the 6-cent proportional rate. Its rate would then be the in-bound flat rate from the Kansas origin to Kansas City plus 15 cents to Chicago. Many such instances could be multiplied and the final result would be that in innumerable instances the carriers would transport grain back and forth between Omaha and Kansas City without any compensation whatsoever.

Many other instances of the same kind could be cited, but these are sufficient to illustrate the utter disruption of the relations of rates painstakingly worked out by the Commission if transit balances of 9.5 cents became available for transportation from Omaha and Kansas City to Chicago, in lieu of the present proportional rates of 16 cents. Repercussions would be felt throughout the entire fabric of the structure, both east and west of the primary markets and would extend also to the territory east of the Mississippi.[21]

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[21] The prescribed proportional rate from Duluth and Minneapolis to Chicago, 12 cents, is 3 cents lower than the prescribed proportional rate of 15 cents from Sioux City, Omaha, Kansas City and other Missouri River markets. In *Southwestern Millers League* v. *A., T., & S. F. Ry. Co. et al.*, 227 I. C. C. 795, decided July 12, 1938, the Commission prescribed proportional rates from Chicago to eastern points 3 cents higher on grain from Duluth and Minneapolis than on grain from the Missouri River markets, with the

IV

In finding, upon a review of all the relevant facts and circumstances shown of record, that the alleged discrimination or prejudice was not unjust or undue, the Commission considered only pertinent matters properly to be considered in rate regulation

It is argued by appellants that the Commission based its finding of unjust discrimination upon other than transportation considerations and they contend, if we understand them, that the Commission should have wholly excluded from consideration the questions (1) whether to grant relief would reestablish the dual system of rates from the primary markets, (2) disturb and disrupt the rate-break structure, (3) reduce the revenues of the carriers (Br., pp. 29, 41, 86–91).

1. Reestablishment of the dual system would restore the conditions which the Commission had found not only highly unsatisfactory but unlawful. These conditions, relating to transportation rates, were obviously "transportation" conditions.

2. Appellants' argument is to the effect that the preservation of the rate structure was an improper consideration, that "the basis for the orders is the desire to protect a rate structure" (Br., p. 90); that in *U. S.* v. *Chicago, M., St. P. & P. Ry. Co.*, 294 U. S. 499, this Court annulled a Commission order because "based upon a desire to preserve the rate structure rather than upon proper transportation consideration." (Br. 37.)

In that case the Milwaukee had proposed a certain reduced rate. The Commission suspended the proposal and after hearing found it was not justified, on the ground, among others, that similar reductions would probably follow in other rates

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result that the aggregate charges from the latter markets, on grain originating in the West and Southwest, are equalized with those from Duluth and Minneapolis, on grain from the Northwest, through Chicago, to eastern points. This relationship would be disrupted, and probably could not be restored satisfactorily, if the grain moved from the western primary markets to Chicago at *varying unpublished* transit balances.

and that the rate structure would be broken down. But the rate structure there involved, applying on bituminous coal in the Indiana-Illinois-Kentucky-Wisconsin territory, had not been fixed by the Commission. It was composed of carrier-made rates and it was criticized in the Commission's report. The Court pointed out that the whole situation was subject to the power of the Commission:

> The whole situation is subject to the power of the Commission, which may keep the changes within bounds. If Illinois lines attempt to lower their rates again, a proceeding will be available to maintain a fair relation. If the lines in Kentucky, operating in interstate commerce, apply for new reductions, the supervisory power of the Commission will subject them to the rule of reason.

In the same case the Court further said:

> But other remedies even more plainly adequate are at hand in case of need. Under section 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly. *Florida* v. *United States*, 292 U. S. 1; *United States* v. *Louisiana*, 290 U. S. 70.

This is the authority the Commission exercised in the case at bar. It has conducted a comprehensive inquiry into the rates of all the lines in the Western District on grain and grain products, has fixed the fair relation between one line and another, between the various producing areas and between the markets. It has built the structure of the rates, it is within its power to keep changes within bounds.

Moreover, in *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, the Commission, as in the *Milwaukee* case, found a proposed rate reduction not justified. As stated in the opinion of this Court, at page 479, "the appellants'

principal complaint is that the Commission raised the permissible minimum rate to prevent disruption of the existing rate structure and relationship of rates for carriage from various producing regions to Ohio destinations, and that an order grounded upon any such consideration is unauthorized and violates the principle announced in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499."

In rejecting the complaint and sustaining the Commission's order the Court held the situation in the *Youngstown* case to be quite distinct from that in the *Milwaukee* case, pointing out that in the *Youngstown* case the Commission had prescribed the existing rate structure:

> The position is not well taken. This record exhibits a situation quite distinct from that disclosed in the cited case. In the first place the Commission here found the required minimum reasonable; in the second place, it had, after full investigation in this and the *Ohio* case [192 I. C. C. 413, order sustained, 6 F. Supp. 386, 292 U. S. 498], held the existing rate structure—built upon certain reasonable key or controlling rates by application of proper differentials—just and reasonable, and the ex-river rates here in issue, in contrast, too low.

Appellants' suggestion to the effect that the Commission was without power to control proposed changes that would disrupt the just and reasonable rate structure which it had prescribed—and which is here not attacked—is thus plainly without merit.

In an attempt to show as a matter of law that the Commission must confine its consideration to "transportation conditions," appellants cite *United States* v. *Ill. Cen. R. R. Co.*, 263 U. S. 515, in which *inter alia* the Court said:

> To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not

justified by the cost of the respective services, by their values, or by other transportation conditions.

In the same case, at pp. 525–526, this Court further said:

> The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act, 1920. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interests of the individual carrier must yield in many respects to the public need. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable.

It is evident from the decision as a whole that the term "transportation conditions" is very broad. The term is obviously not used in a narrow sense, such as appellants seem to ascribe to it. It undoubtedly means much more than operating conditions, or conditions relating merely to the physical movement of the traffic. The *Illinois Central* case (263 U. S.

515) together with others, including *Texas & Pacific Ry.* v. *I. C. C.*, 162 U. S. 197, *I. C. C.* v. *B. & O. R. R.*, 145 U. S. 263, *Ann Arbor R. Co.* v. *United States*, 281 U. S. 638, establish that the viewpoint of the Commission must be broad, and that the Commission is not bound to find unjust discrimination upon a restricted consideration, such as that urged by complainants.

In *I. C. C.* v. *C., R. I. & P. Ry.*, 218 U. S. 88, 103, the Court said:

> The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this Court has taken occasion to characterize.

Here the Court, after quoting from *I. C. C* v. *Ill. Cent. Ry. Co.*, 215 U. S. 452, said:

> It was, of course, recognized in that case that there must be power in the Commission to make the order which might be subject to attack, but want of power was distinguished from the mere expediency or wisdom of making it, which, it was disclosed, was not open to judicial review.

3. By their formal complaints, complainants sought certain additional transit at the primary markets. As one of its reasons for refusing to order it, the Commission stated that it would result in reestablishment of the dual system of rates (231 I. C. C.; R. 650). Reestablishment of the dual system would mean both proportional rates and varying transit balances lower than the proportional rates to cover the outbound transportation from the primary markets, with the result that

the revenues of the carrier would be substantially reduced. The Commission so found in 229 I. C. C., 15 (R. 643):

> To require the additional transit requested, under either section 1 or section 3, would be to impose an additional burden upon the carriers in respect of one of their most comprehensive adjustments and important groups of commodities, and, incidentally, at a time when they are least able to bear it.

To consider the effect of the relief sought upon the revenues of the carriers, along with all the other relevant facts and circumstances, in determining whether the alleged discrimination was undue or unjust and therefore unlawful, was not only within the authority of the Commission but was within its duty, under the new policy adopted by Transportation Act, 1920, and carried forward in Transportation Act, 1940 (54 Stat. L. 898).

As stated by Chief Justice Taft, speaking for the Court in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, Transportation Act, 1920, made a new departure. "Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill."

Section 15a, as enacted in 1920, required the Commission to readjust the rates so that they would provide a fair return to the carriers to enable them to maintain an adequate railway system.

Emergency Railroad Transportation Act, 1933 (48 Stat. 220), amended section 15a so as to provide that in the exercise of its power to prescribe just and reasonable rates, fares, and charges, and all classifications, regulations, and practices relating thereto, the Commission "shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service." [22] See *New England Divisions Case*, 261 U. U. 184; *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456; *Florida* v. *U. S.*, 282 U. S. 194; *Louisiana* v. *U. S.*, 290 U. S. 570; *Florida* v. *U. S.*, 292 U. S. 1; *Texas v. U. S.*, 292 U. S. 522.

It was plainly not error for the Commission to consider the revenue effect of the proposal, along with other pertinent matters.

V

The orders in question do not disturb natural advantages of rate-break markets

Appellants argue at pp. 57 et seq., of their brief, that the breaking of rates at the primary markets and the advantages flowing from this rate-break are all the result of natural conditions prevailing at the rate-break markets; that the reason they are rate-break points is because the rates naturally break there, because these points are located where they are and because, for the most part, one set of railroads ends and another begins at these points; that the Commission has no power to offset or equalize such natural advantages.

The Commission has disavowed in several cases authority to deprive a locality of natural advantages through artificial

[22] This provision is brought forward in Transportation Act, 1940. See also the declaration at the opening of that Act of the National Transportation Policy.

rate adjustments. But appellants' argument that the benefits flowing to primary markets from the rate-break system are due to natural advantages seems clearly unsound. It is true the rails of certain carriers end at the primary markets, but such roads connect with each other and with other roads at their termini, and form through routes. The Commission has full authority to establish reasonable through rates over these through routes; and it is not required to retain the rate-break method even over those routes. There are a number of railroads whose lines extend through the primary markets. Under the broad powers of the Commission to regulate interstate rates, it is within its authority to establish overhead rates over all lines through the primary markets, in lieu of the rate-break method now approved. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, and cases cited, especially at page 666.

Indeed, one of the important issues in the Grain case, as stated in 164 I. C. C., 639 (R. 47), was "whether the rates through the primary markets shall be made on the combination of flat rates to and proportional rates from the markets exclusively, or in part, or at all." The Commission concluded to adopt the rate-break method exclusively, but warned that if that method failed, a uniform mileage basis through the markets, with transit balances *exclusively* beyond the markets, would be a possible alternative. It said (164 I. C. C., pp. 661–662, R. 69–70):

> Pronounced changes in market relations will result from the foregoing findings. [Referring to the general finding made on pp. 660–661 of the report, R. 68–69.] The original basis of overhead through rates with transit at the primary markets proved unsatisfactory and gave rise to the proportional rates. The proportionals were quite generally observed prior to the general percentage changes and were productive of much less complaint than the present proportional rates and transit balances, which do not function together harmoniously. A return to the method, strictly observed,

> of making through rates by combinations on the primary markets is warranted by this record, in the interest of market, carrier, and producer. If it should fail, a uniform mileage basis through the markets, with transit balances exclusively beyond the markets, is a possible alternative.

In the same report the Commission at p. 662 (R. 70) quoted from *Minn. Traffic Asso.* v. *C., M. & St. P. Ry. Co.*, 46 I. C. C. 685, 692, as follows:

> This proceeding is additional evidence "that there has never been an adjustment that was satisfactory to the rival markets." Perhaps only a uniform mileage scale would preclude claims of relative maladjustment, and while no market desires this system to be here applied or applied generally, eventual resort to this basis may possibly be the only outcome of reiterated complaint over a complex situation which we have repeatedly tried to adjust.

Perhaps it may be conceded that because of their location, the number of railroads serving them, the existence of storage capacities for a huge volume of grain, and the fact that they are great primary markets, it is logical, convenient, and workable that the rates should break on these markets. The Commission fully recognizes this, since it adopted the rate-break system of rates on grain through these markets after exhaustive investigation and consideration. But it would not seem that the primary markets are entitled to that particular form of rates, as a matter of law. While under the Act they are entitled to reasonable rates that are free from unjust discrimination and undue prejudice, it can hardly be challenged that the form of the rates, whether they shall be combinations or overhead through rates, is a matter within the administrative discretion and judgment of the Commission.

Nor can it be said that there is anything in the location, etc., of the primary markets that fixes, as a matter of law, the measure of their rates. If their location and other natural

advantages entitle them to the rate-break (which is not conceded), it would not follow, as a matter of law, that they are entitled to *both* rate-break combinations and overhead through rates with transit balances, especially when the out-bound component of the rate-break combination—the proportional rate—is fixed by the Commission at a substantially lower level than that previously in effect, *in consideration of the elimination of the lower transit balances.*

If the primary markets transited only on overhead through rates, they would have varying out-bound transit balances. As the Commission determined the measure of the proportional rates by averaging the transit balances under reasonable overhead through rates [determined but not prescribed] and reasonable in-bound flat rates, it follows that the reduced proportional rates prescribed are approximately equal to the average of transit balances that would apply if reasonable overhead through rates were in effect via the markets with transit thereunder at the markets. If Kansas City, e. g., were allowed to transit under the prescribed Omaha-Chicago proportional rate of 15 cents, applied as an overhead through rate over certain routes through Kansas City in order to enable those routes to compete with the other routes not running through Kansas City, that market would have a transit balance of 9 cents to Chicago, since it would have paid the proportional rate of 6 cents in-bound to Kansas City from Omaha. But to permit this transit, in addition to the almost unlimited transit under the rate-break combinations on Kansas City, would give Kansas City a *particular* transit balance substantially lower than its proportional rate of 15 cents to Chicago, fixed in the manner above shown. Thus Kansas City, while retaining a proportional rate based on the average of transit balances, would obtain a particular transit balance *below* the average and at the same time escape all transit balances *above* the average. If the interior points have a low transit balance on these particular routes and rates, they will

pay in other instances high transit balances. They have no proportional rates. They may transit only on overhead through rates with all the restrictions attached to transit under such rates, as previously shown herein, and must pay the transit balance in each instance in which they obtain transit at all, whether such balance is high or low.

There appears to be nothing in the location or other natural advantages of the primary markets that entitles them to the proportional rates, determined and fixed in the manner above explained, and also to certain transit balances lower than those proportional rates.

It thus seems clear that in prescribing the rate-break system for application on grain transited at the primary markets, the orders in question fully preserve the advantages of location and other natural advantages of those localities, and in requiring that they adhere to that system exclusively, the orders do not have the effect of neutralizing or offsetting their natural advantages. As stated by the court below (R. 746–747):

> The establishment of proportional rates at the primary markets was to an extent because of their natural location and the convergence and radiation of rail lines thereat and therefrom. The proportional rate was considered peculiarly appropriate to the natural conditions existing at the primary markets. It was intended to secure to those markets all of the advantages of the through rate with transit to which the primary markets were entitled from that rate because of their geographical location and natural advantages and the additional advantages inherent in the proportional rates, which additional advantages sprang from natural and geographical considerations. But when the Commission examined the situation resulting from the use of both the transit on through rates and the proportional rates by the same markets it found that the combining of the use of both resulted in advantages to the pri-

mary markets which did not flow from their geographical location but were on the contrary in spite of natural conditions and to the material disadvantage of other markets.

VI

The legal effect of the challenged orders is the same as if supported by all members of the Commission

In section IV of their brief, appellants refer to the dissents of commissioners in the last two reports. But the dissenting commissioners disagreed with the majority in reference to the weight to be given to the evidence or the judgment to be exercised upon the administrative problem presented. The weight of the evidence was, of course, for the Commission.

> • • • If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action. [*New England Divisions Case*, 261 U. S. 184, 203; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658.]—*C., R. I. & P. Ry. Co.* v. *United States*, 274 U. S. 29, 33–34.
>
> To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province.—*Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663.
>
> The credibility of witnesses and weight of evidence are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence. See *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92, 100; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320;

Assigned Car Cases, 274 U. S. 564, 580, 581.—*Warehouse Co.* v. *United States*, 283 U. S. 501, 508.

Appellants' reference to these dissents seems to be but another manifestation of their erroneous conception that this Court will perform administrative functions. The decision in *Int. Comm. Comm.* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 251, is here relevant.

> As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. • • • We say the contentions all reduce themselves to this, because in their final analysis all the other differences, insofar as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. *Baltimore & Ohio R. R.* v. *Pitcairn*, 215 U. S. 481. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except insofar as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission.

Cf. *Int. Comm. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 550; *Mfrs. Ry. Co.* v. *United States*, 246 U. S. 457, 482.

In *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 362, this Court held: "The legal effect of the challenged report and order is the same as if supported by all members of the Commission. [Citing cases.]"

VII

The Commission's orders, granting to the primary markets all the advantages of transit under the rate-break system, do not subject them to legal damage by denying to them the further advantage of additional transit under competitive overhead rates

The Commission's reports make it clear that even if there were no exceptions whatever to the rule for the exclusive application of the rate-break combinations, the primary markets would still be confronted with their *major competition.*

Using again the typical Omaha-Chicago proportional rate of 15 cents, one of the most important rates in the entire Western District: As previously shown this rate applies over numerous direct routes which do not pass through Kansas City. There are important transit points on these direct routes, such as Des Moines, Cedar Rapids, and Davenport, Iowa (229 I. C. C. 9, 14; R. 641), which would have transit under the 15-cent rate whether it was applied over routes through Kansas City or not. The Commission found that these points are not, for that reason, unduly preferred (R. 642) and it follows that Kansas City, in this situation, is not unduly prejudiced. In respect of shipments transited at points on the direct route, the Commission's finding was as follows (229 I. C. C. 14–15; R. 642):

> Using again the familiar illustration of lack of transit at Kansas City on the basis of the proportional rate from Omaha to Chicago: (1) A transit point on the direct route, such as Cedar Rapids, cannot be said to be unduly preferred; nor can Omaha or Chicago, each with the benefit of the direct route; * * *

Under the original exception to the rule, competing carriers whose routes pass through an intervening primary market were permitted to establish over their routes the same rate that applied over the direct route, in order to meet the competition of the carriers having the direct routes, but, as heretofore explained, mere establishment of the rate over the

indirect route would not effectively meet the competition where the direct route carriers granted transit at an intermediate interior point. Under modifications of the rule, the competing carriers were permitted to establish transit at an intermediate interior point on their routes where such point was also a point on the direct route and had transit. Hereinbefore this situation was illustrated by reference to routes and rates from Sioux City to Chicago with transit at Ft. Dodge, Iowa. Another illustration may aid in further clarifying it.

Des Moines, Iowa, is on the direct line of the Chicago, Rock Island & Pacific between Omaha and Chicago. The 15-cent proportional rate from Omaha to Chicago applies over the Rock Island, whose tariffs provide for transit under that rate at Des Moines. The lines of the Missouri Pacific and the Chicago Great Western form a route from Omaha to Chicago through Kansas City and Des Moines. Under the exceptions to the rule, these lines have published the 15-cent proportional rate as a joint rate applying over their route from Omaha to Chicago, and they grant transit at Des Moines, this action being taken to meet the competition of the Rock Island.

Des Moines would have transit under the 15-cent rate over the Rock Island whether or not the Missouri Pacific and the Chicago Great Western applied the 15-cent rate over their route and whether or not they granted transit under it. Speaking of such a situation, the Commission found:

> * * * the benefit here is wholly to the carrier over the indirect route, in its competition with the carrier over the direct route * * * (229 I. C. C., 15; R. 642).

In other words, the interior point, Des Moines in the particular illustration, is not benefited by the action of the Missouri Pacific and the Chicago Great Western in establishing the 15-cent rate over their route through Kansas City and Des Moines and granting transit at Des Moines, in order to meet the competition of the Rock Island. For, even without that action,

Des Moines has the rate over the Rock Island and has transit under it. The only benefit is to the Missouri Pacific and the Chicago Great Western, in that it enables them to participate in the traffic on even terms with the Rock Island, if they can induce the shippers to send some of the traffic over their indirect route. Kansas City is not injuriously affected because the traffic through Des Moines is divided among competing carriers.

Under the later modification to the rule, other points on the indirect routes were permitted to be given the restricted form of transit accorded interior points on other routes, upon a finding by the Commission that without it they would be subjected to unlawful prejudice. This, the Commission found, does not materially injure appellants, and *at most* was merely *an aggravation* of their general competitive situation. The Commission's finding reads (229 I. C. C., 14; R. 641–642):

> Cancellation of the transit accorded points on the indirect route, through a rescinding of our modification of the findings in the *Grain case* to permit of that transit, would deprive these interior transit points of the same kind of transit accorded interior transit points on other routes and, as found in the last report, page 245, *would not materially benefit complainants*, who would still be confronted with their major competition * * *. [Italics ours.]

Thereupon, the Commission quoted from its previous report, 223 I. C. C. 235, 245, as follows:

> * * * A return to our first view would, however, be a hardship upon the milling industry at many intermediate points, *with little or no benefit to the markets*, which would still be at a disadvantage in competing with other rate-break markets, and interior points on lower-rated routes. * * * [Italics ours.]

It then said it seemed clear "that the transit at points other than the rate-break market on the indirect route, resulting from the further modification of the findings in the *Grain case*, was at most merely an aggravation of a general

competitive situation which had already foreshadowed these complaints, and that it afforded a welcome additional argument in the general cause rather than a sound basis for a claim of undue preference."

So that, even if the Commission rescinded its exception permitting transit at interior points on the indirect routes, it would result in little or no benefit to the markets on the same routes, since the competition of other rate-break markets and the competition of interior points on the direct routes would remain. This is a disadvantage to the primary markets insofar as they are intermediate points on the indirect routes, that inheres in the rate-break system. The markets do not wish the rate-break system canceled, since it is of great advantage to them. They are under a minor disadvantage in a general rate structure that is otherwise highly advantageous to them. The Commission weighed this minor disadvantage to the primary markets against the much greater injury that would follow from its removal, including the resulting injury to the carriers through substantial loss of revenues, needed to maintain adequate transportation service, which would result from the necessity of carrying great volumes of grain at 9 cents instead of the rate of 15 cents prescribed by the Commission as reasonable, and the destruction of the relation of rates whereby grave injuries would result to producing areas throughout the states west of the primary markets owing to the fact that they would in all instances have to pay the prescribed proportional rates whereas the primary markets could obtain substantially lower transit balances. These injuries, in the judgment of the Commission, outweigh the minor disadvantage of the primary markets. Perhaps, in a complex situation such as that here presented, exact equality in respect of each of and all the many rates and rate relations involved is unattainable. But the Commission's orders are not void even if they fail in these circumstances to attain exact equality. As in the *Illinois Central* case, 215 U. S. 452, 478, appellants' arguments "but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality."

VIII

The relief sought—annulment of only part of the general adjustment prescribed by the Commission—should be denied because to grant it would require the exercise of the administrative function of revising the adjustment

The prayer of the bill, in the alternative, asks the court to set aside the Commission's orders "*in so far as* the same require or permit a basis of transit at the terminal markets herein mentioned different from the basis of transit at competing interior or intermediate points, and *in so far as* the same require or permit transit at such terminal markets at different and higher rates than at such interior or intermediate points * * *." [Italics ours; R. 24.]

This alternative prayer, if granted, could be complied with either by withdrawing the particular transit in question from the intermediate interior points or by extending it to the intermediate primary markets, but it is clear that appellants would not want the alleged discrimination corrected by withdrawing the transit from the intermediate interior points. This is clear from the Commission's report in 229 I. C. C. 9, in which, at pp. 13–14 (R. 641), the Commission said:

> Complainants themselves do not want the transit in question taken away from the points other than the rate-break market on the indirect route. In pressing their contention of undue prejudice under section 3 they assume that an order for its removal would be complied with by the establishment of transit at the rate-break market instead of by its cancelation at the other points. They say they cannot conceive of the carriers complying with a mandatory order in any other manner. Only when pressed for a definite commitment, in the event of the carriers' exercise of the other alternative, do they say that they must ask for the cancelation of the transit at these other points if it is not established also at the rate-break market.

In the same report, at pp. 14–15 (R. 642), the Commission further said:

> * * * a mere finding of undue prejudice here, even if warranted, could be satisfied by cancelation of transit at the points other than Kansas City, instead of establishing it as Kansas City, *but such a compliance would not satisfy the main complaint.* [Italics ours.]

If the alternative prayer of the bill were granted, it could be lawfully complied with only by extending the transit in question to the primary markets, because, as the Commission found (229 I. C. C. 9, 16; R. 644), withdrawal of this transit from the interior points on indirect routes through intermediate rate-break markets would result in undue prejudice against such points and undue preference of other interior points on the direct routes.

What appellants seek in this suit is the extension of the transit to the primary markets. In substance they ask the Court to compel the Commission to issue a mandatory order to the carriers requiring that they grant the transit there.

The result would be that the primary markets would obtain highly important transit balances which would carry a great volume of grain, at levels substantially lower than the reduced, reasonable proportional rates prescribed by the Commission.

Yet, as previously noted, the Commission prescribed the reduced proportional rates upon the condition that the lower transit balances be eliminated.

Appellants' bill does not ask that the prescribed proportional rates be enjoined. Appellants wish to retain these proportional rates and at the same time obtain the reestablishment of the lower transit balances. But it is obvious from the Commission's reports that the reduced inbound flat rates and the reduced outbound proportional rates would not have been prescribed without the requirement that the transit balances be eliminated. It is not certain that any proportional rates would

have been prescribed without that condition. Without that, the Commission might have concluded, in order to remove the illegality found in the dual system of rates, to prescribe overhead through rates with transit balances exclusively. It is also obvious from the Commission's reports that the Commission built the entire structure of rates through the primary markets upon the foundation of the rate break, carefully aligning the inbound flat rates and the outbound proportional rates so as to accord to all producing areas, markets, gateways, interior milling points, destinations and carriers not only reasonable rates but also reasonable and proper rate relations as nearly as could possibly be done, considering distances, volume of the movement, value of the commodity, market and carrier competition, carrier revenues and other elements entering into the making of rates.

Thus, it is clear that the appellants, in not attacking the prescribed rate structure as a whole but in seeking to eliminate an integral part of it, in reality ask the Court to revise the prescribed adjustment.

The order is not segregable in this respect. It is true the Urgent Deficiencies Act (38 Stat. 219), authorizes the setting aside, in whole or in part, of a Commission order. But inasmuch as administrative orders operating *in futuro* are legislative in character, the Court will decline to enjoin an integral part of an unsegregable order, on the ground that it would trench upon the legislative function.

This Court has repeatedly held that it will not *revise* a rate adjustment fixed by an administrative body acting within the scope of its authority. As said by Chief Justice Hughes in *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 599:

> As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439; *Louisville & Nashville R. R.* v. *Garrett*, 231 U. S. 298, 313.

And, in *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 51:

> The court does not sit as a body of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. [Citing cases.]

The relief sought should be denied on the ground that to grant it would require the Court to perform administrative functions.

CONCLUSION

It is respectfully submitted that the decree of the court below, dismissing the bill for want of equity, should be affirmed.

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